Supreme Court, U.S.
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No. 97-

In The
Supreme Court of the United States
October Term, 1997

RICHARD CARROLL,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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20+ pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer who is required by federal regulations to conduct random drug testing of its employees is liable to the tested employee, under the Procedural Due Process Clause of the Fifth Amendment to the United States Constitution, for violations of the testing procedures mandated by the regulations which occur during the collection of the employee's test sample, where the employer delegates operation of the drug test to third party collection site personnel.

2. Whether, where an employee' employment is terminated as a direct result and consequence of violations of his due process rights in relation to a random drug test mandated by federal law, and under compulsion of that federal law, the employee's employer is liable to the employee under the Due Process Clause of the Fifth Amendment, for said termination.

3. Does 49 CFR Section 40.1 apply to an employer such as Respondent?

4. Whether federal law or the law of the state of the forum applies to construction of the Fifth Amendment to the United States Constitution, in determining the rights of a tested employee to due process under the Fifth Amendment.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Richard Carroll, and the respondent Federal Express Corporation.

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RICHARD CARROLL,

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FEDERAL EXPRESS CORPORATION

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petitioner, Richard Carroll, respectfully prays for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on May 6, 1997.

OPINIONS BELOW

The Opinion (A-2) of the Court of Appeals for the Ninth Circuit below, No. 95-16603, is published. The trial court's Order granting Respondent's motion for summary judgment, CV-93-4243-SC (B-17) is unreported.

JURISDICTION

The decision of the Ninth Circuit in this case was entered on

May 6, 1997. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254 (1).

REGULATIONS INVOLVED

The federal regulations involved in this case are 49 C.F.R. Sec. 40.1 et seq., and 49 C.F.R. Sec. 391.71 et seq. The pertinent text is set out in the Appendix, at pp. D-1 to D-51.

STATEMENT OF THE CASE

Petitioner (Richard Carroll, "CARROLL") filed his petition for mandamus and complaint in California Superior Court, County of San Mateo, on October 29, 1993, alleging violation of his rights under the United States Constitution and California state law. Respondent, a Delaware corporation, removed the action to federal court on December 1, 1993, on the basis of diversity.

On July 14, 1995, Respondent moved for summary judgment on Petitioner's claims. The District Court granted Respondent's motion on August 14, 1995; judgment was entered on August 14, 1995, and filed on August 15, 1995. Petitioner filed his Notice of Appeal on August 17, 1996. The Ninth Circuit Court of Appeals entered its decision on May 6, 1997. The instant petition is from that decision.

This petition concerns whether an employer, required by federal regulations to conduct random drug testing of its employees, is liable under the Fifth Amendment to the employee being tested:

a) for violations of collection procedures (mandated by the regulations) occurring during the collection of the tested employee's drug test sample; and,

b) for the consequent damages suffered by the employee as a result of the termination of his employment with the employer, which termination was a direct result of the employee allegedly testing positive for cocaine pursuant to said mandated testing.

Richard Carroll was employed for eight years by Respondent, a motor carrier, from December 1984 until December 1992, the last four years as a courier. Pursuant to regulations of the United States Department of Transportation ("DOT") and Federal Highway

Administration ("FHWA") (see 49 C.F.R. Sec. 40.1 et seq.,[1] and Sec. 391.81 et seq.[2]), and its own "Fitness for Duty/Drug-Free Workplace" policy (E. R. 25-48), which "mirrors" the DOT regulations, Respondent required Petitioner to submit to a random drug urinalysis test in South San Francisco, California, on November 30, 1992. When Petitioner allegedly tested positive for cocaine, Respondent, acting under compulsion of the DOT regulations, terminated Mr. Carroll's employment on December 18, 1992, "for violation of the Fitness for Duty/Drug-Free Workplace" policy (E. R. 55, 56, 61)

The DOT/FHWA regulations require that Respondent, as a motor carrier:

> "shall have a drug testing program that conforms to this subpart and 49 CFR part 40..." (Sec. 391.93(a)

and

> "shall ensure that the test performed under the requirements of Sec. 391.109 [i. e., random drug testing] conforms with 49 CFR part 40 and this subpart (Sec. 391.81 et seq.)" Section 391.111(b)

Section 40.1 provides:

> "This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employers, including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employer's officers, employees, agents and *contractors* (including, but not limited to consortia). Employers are responsible for the compliance of their officers,

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1. All citations hereinafter to the Code of Federal Regulations ("C.F.R.") are to Title 49 thereof.

2. Pursuant to 49 C.F.R. Sec. 391.125, 49 C.F.R. Sections 391.81 et seq., were superseded by 49 C.F.R. Part 382, effective January 1, 1995. The provisions of Section 491.81 et seq. and Part 382 are effectively identical for all pertinent purposes of this action.

employees, agents, consortia and/or *contractors* with the requirements of this part." (emphasis added)

The Regulations also authorize Respondent to use a "collection site person" to do the actual collection of its employees' test sample. 49 CFR Sec. 40.23, 40.25. Respondent employed the services of a third party, Options And choices ("OAC") as its collection site personnel. Respondent argued below, and the courts below erroneously agreed, that such delegation of the operation/actual collection of the employee's test sample permits it to avoid all responsibility for violations of the Regulations (and, therefore, of Petitioner's right to procedural due process) which occurred during the collection of Petitioner's drug test sample. Certiorari should be granted to reverse the lower courts' erroneous holdings and enforce Respondent's responsibility to its tested employees as mandated by the regulations.

The DOT regulations require Respondent as a motor carrier employer to "develop and maintain a clear and well-documented procedure for collection...of urine specimens.." for drug testing. 49 C.F.R. Sec. 40.23. They also set forth detailed mandatory procedures regarding the administration of random drug-testing, including strict procedures for the collection, labelling and chain of custody of test sample and certification that the requirements of the DOT regulations have been followed (Sec. 40.23, 40.25, 391.71 et seq., 391.93, 391.111(b)); Federal Register, Vol. 52, # 157, Aug. 14, 1987, at p. 30638.[3]

However, despite these clear requirements, Ms. West (the OAC employee who acted as the collection site person for the collection of Carroll's drug test sample) intentionally failed to comply with the DOT regulations governing that collection. At her direction, and contrary to the regulations' mandatory requirements, Mr. Carroll signed the chain of custody and labels for his samples before he gave his test sample, before the labels were placed on the sample containers and before the samples were sealed outside of his presence. He did not see any of the labels being attached to his drug test sample (CR. 40-114:19-115:20; 117:3-119:12; 296:18-298:11, E. R. 367-368, 370-372, 383-385). Ms. West testified that she recalled nothing specifically about Mr. Carroll's specimen collection (CR 40-61:12-17; 62:14-19; 79:17-80:13; 80:21-

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3. After test samples are collected, Respondent's own employee couriers deliver the samples to independent laboratories for chemical analysis.

86:19, E.R. 529, 530, 533-534, 534-540). She did recall, however, that she did have at least one Federal Express employee complete the labels before giving his sample; she did not recall whether Mr. Carroll signed his labels prior to the alleged placing of the labels on the alleged sample bottles (CR 40, E. R. 543-544).

These violations of the procedures mandated by the Regulations compromised and vitiated the integrity and reliability of the test sample obtained from Carroll. Thus, Respondent has no proof that the test results alleged to be Mr. Carroll's were in fact the results of his sample.

Carroll unsuccessfully grieved his termination through Respondent's internal grievance procedure, presenting ample evidence that it was not his test sample that tested positive.

Because of the violations of the DOT regulations which occurred during the collection of Mr. Carroll's test samples, Carroll's actual test results are unknown and unknowable. The split sample alleged to be that of Mr. Carroll was not preserved for discovery.

Carroll has never used cocaine nor any other controlled substance. Contrary to the Ninth Circuit's opinion, Mr. Carroll does not allege (and has never alleged) that he tested positive on the drug test in issue. He has always alleged to the contrary.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED IN INSTANT CIRCUMSTANCES

Petitioner seeks a Writ of Certiorari to the Ninth Circuit to reverse the decision in his case because the Circuit Court's decision raises a serious issue of nation-wide importance affecting all employers and employees subject to federally mandated drug testing: whether an employer is relieved of responsibility imposed by the DOT regulations upon the employer for compliance with the collection and testing requirements of said regulations, when the employer delegates operation and actual performance of the collection of employee drug test samples to third party collection site personnel. Does delegation, as authorized by the regulations, of the performance of the collection of test sample to third party collection site personnel, delegate the employer's responsibility (and, consequently, liability) for compliance with the regulations' requirements, so that the employer is no longer liable for said compliance? The express commands of the regulations are clearly to the contrary.

The Ninth Circuit began its analysis by the choice of the wrong

law (App. p20-21 n.1, Op. at p. 5311 n. 1). Petitioner's federal constitutional claim for violation of his due process rights under the Fifth Amendment (E.R.12-13) is brought under the Fifth Amendment to the federal constitution. Disregarding the clear allegations of Carroll's complaint, the Ninth Circuit held, without any basis in the record, that Mr. Carroll's claim was brought under either 42 U.S.C.S. 1983 or California common law (wrongful termination in violation of public policy) (App. 20-21 n.1, Op. at p. 5311 n. 1). It, therefore, erroneously applied California common law.[4]

However, for purposes of the collection and testing of Petitioner's drug test sample, Respondent is a federal actor acting under compulsion of federal regulations (see Skinner v. Railway Labor Executives' Assn., (1989) 489 U.S. 602,614-615, holding that, where a private corporation complies with the provisions of drug-testing regulations under federal government compulsion, the lawfulness of its acts are controlled by the federal constitution). Since Section 1983 applies only to state actors, not federal actors, Carroll's claim is clearly not brought under Section 1983.

Nor, as the express allegations of his claim show, is Carroll's Fifth Amendment claim brought under California state law.

There is nothing "ambiguous" with the legal basis of Carroll's procedural due process claim (ER 12-13, para. 30-32; contra App. 20 n.1, Op. p. 5311 at n. 1). It is clearly a Bivens action for violation of Petitioner's Fifth Amendment rights (see Bivens v. Six Unknown Named agents of Federal Bureau of Narcotics (1971) 403 U.S. 388.[5])

In his complaint, Carroll clearly and unambiguously alleges that the violations of the DOT regulations which occurred during the collection of his random drug test sample and the consequent violation of his substantive Due process rights in Respondent's termination of his employment violated his Fifth Amendment rights. Mr. Carroll seeks to vindicate his Fifth Amendment right (E.R.12-13) to procedural due

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4. In fact, the Ninth Circuit's application of California common law was also in error since it ignored California law concerning "non-delegable duty" (discussed below). See: Sugimoto v. Exportadora De Sal, S.A. De C.V. (9th Cir. 1994), 19 F.3d 1309,1311-12. Rob-Mac, Inc. v. Dept. of Motor Vehicles (1983) 148 Cal.App.3d 793,798).

5. See also Davis v. Passman (1979) 442 U.S. 228; Schweiker v. Chilicky (1988) 487 U.S. 412 ("Bivens actions" are permitted for violations of the Due Process Clause of the Fifth Amendment),

process regarding the manner in which his drug test sample was collected in violation of the DOT regulations, and his substantive due process rights regarding Respondent's wrongful termination of his employment. These allegations cannot properly be interpreted either as a claim under 42 U.S.C.S. 1983 or as a claim under California law for termination in violation of public policy.

Erroneously interpreting Carroll's claim, the Ninth Circuit improperly concluded that it should look to principles of California law to determine whether Respondent is liable for the actions of OAC and Ms. West. Contrary to the Ninth Circuit's opinion (Op. p. 5311 n.1), however, the source of Carroll's cause of action is determination of the choice of law. Instead of erroneously applying California law, the Ninth Circuit was required by this Court's clear precedents to apply federal law, as set forth in the regulations themselves.

It has long been obvious to this Court (as it should have been to the Ninth Circuit) that the liability of federal actors for violations of citizens' constitutional rights should be governed by uniform federal rules, not by the law of the forum. Carlson v. Green (1980) 446 U.S. 14, 23. The question of Respondent's liability as a federal actor for violation of Carroll's federal constitutional rights under the Fifth Amendment, should not be left, as the Ninth Circuit improperly has done, to the "vagaries of the laws of the several States" or of the forum state, in the absence (here lacking) of a contrary congressional resolution. Carlson, supra, U.S. at 23.

Bivens actions, such as Carroll's instant Fifth Amendment claim, are a creation of federal law. Therefore, the question whether Respondent is liable to Petitioner for the violation of Petitioner's due process rights which occurred during the collection of his drug test sample is a question of federal, not California, law. Carlson, supra, U.S. at 23.

The Ninth Circuit erred, therefore, in fashioning and applying a rule of liability that relied exclusively upon the laws of the forum State (California). Only a uniform federal rule of liability (which can be found here in the DOT/FHWA regulations themselves; see 49 C.F.R. Sec. 391.111(b); 40.1) is compatible with the goal of deterring federal actors from infringing federal constitutional rights in the manner alleged by Petitioner. Only such a uniform federal rule will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct by Respondent and other employers subject to federally mandated drug testing regulations. Carlson, supra, U.S. at 23. The

requisite need for uniform treatment of such claims when they are against federal actors cannot be achieved if courts are permitted to apply state law, as the Ninth Circuit did here. Carlson, supra, U.S. at 24.

The Ninth Circuit fashioned its holding by erroneously referring to 42 U.S.C.S. 1988 (App. 20-21 n.1, Op. p. 5311 n. 1). Section 1988 does not in terms apply to Bivens actions, however, and there are cogent reasons not to apply it to such actions even by analogy. Carlson, supra, U.S. at 24 n. 11; Bivens, supra, U.S. at 409 (federal actors have no claim to be bound by law of state in which they work).

As Justice Harlan stated, concurring in Bivens, supra, U.S. at 409:

> "It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law...Certainly, there is very little to be gained from the standpoints of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs."

Mr. Carroll has a procedural due process right "in the way that the drug tests were conducted." (District Court, in its Order re Motion To Dismiss, E.R. 165 n. 2). Fifth Amendment procedural due process guarantees that random drug testing be conducted in accordance with proper procedural safeguards Id. The federal regulations in issue set forth detailed mandatory procedural rules for conducting employee random drug testing. These rules, including but not limited to a proper chain of custody, "are at the heart of procedural due process" (District Court Order re Motion To Dismiss, E.R. 165).

The Regulations impose responsibility upon the employer (Respondent) for compliance with all procedures mandated by the regulations, including the proper conduct of the collection and testing of the random drug testing samples of its employees, and compliance by the employer's agents, employees, and contractors with the regulations' requirements. 49 CFR 381.111(b), 40.1. Without in any way relieving employers of that responsibility, the regulations also permit employers to delegate the actual operation and performance of the collection of employee drug test samples to collection site personnel. 49 CFR Sec. 40.23, 40.25. Here, Respondent delegated the collection of Carroll's drug test sample to third party collection site personnel (Ms. West/OAC). By the clear terms of the regulations, however, such

delegation of the operation of collection does not delegate Respondent's responsibility to West or OAC for ensuring compliance with the regulations. 49 C.F.R. Sec. 40.1, 381.111(b). The Ninth Circuit, however, erroneously held to the contrary. Certiorari should be granted to reverse the lower Court's decision, to ensure that the responsibility imposed by the DOT regulations upon employers to their tested employees for compliance with the procedures mandated by those regulations is enforced. Without proper enforcement of the DOT regulations such regulations are meaningless.

Petitioner does not allege nor seek to hold Respondent vicariously liable for the actions of OAC (contrary to the Ninth Circuit's opinion, App. 20, Op. at p. 5310, 5311 n.1). Rather, he seeks to hold Respondent directly liable for its own failure and that of its contractor, OAC, to comply with the requirements of the DOT regulations. 49 C.F.R. Sec. 40.1 (E.R. 12-13, para. 31, 32; E.R. 339-341). While the DOT regulations authorize the use and detail the activities of the "collection site person" (here, Ms. West and OAC) in the collection, labelling and chain of custody procedures required to occur during the collection of employee drug test samples (49 C.F.R. Sec. 40.23, 40.25), those Regulations do not relieve the regulated employer from responsibility (and, consequently, liability) for the compliance, inter alia, of its contractors with the requirements of the drug testing regulations, despite use of such collection site personnel. 49 C.F.R. 40.1; 391.111(b).

Since the Regulations mandate employer responsibility despite the authorized use of collection site personnel "responsible for maintaining the integrity of the specimen collection and transfer process..." (49 C.F.R. Sec. 40.23(d)(1), 40.23 (preamble), 391.111(b)), the Ninth Circuit erred in holding to the contrary. Certiorari should be granted to hold Respondent liable for the violation of Petitioner's Fifth Amendment rights which occurred during the collection of his test sample.

Applying federal law (i.e., the law set forth in the DOT regulations), it is clear that, while Respondent could properly delegate the details of the operation of the drug test (i.e., the collection and chain of custody procedures) to third party collection site personnel, it may not delegate responsibility and liability for ensuring that the collection and testing conform with the Regulations' requirements. 49 C.F.R. Sec. 391.111(b); 40.1. Respondent owes Mr. Carroll a non-delegable duty, imposed by the Regulations, to insure that the collection

procedures (including, but not limited to, a proper chain of custody) mandated by the regulations be complied with by its contractor, OAC.

Since Respondent is "responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements" of the DOT/FHWA regulations (49 C.F.R. Sec. 40.1), OAC's status - whether as agent, employee or independent contractor - is irrelevant. Respondent remains responsible and liable to Mr. Carroll. Respondent's non-delegable duty is not discharged by using care in delegating it to an independent contractor (General Building Contractors v. Pennsylvania (1982) 458 U.S. 375,395) not even to a third party whose primary business - unlike that of the employer - is drug testing.

In determining whether a non-delegable duty exists and what that duty is, this Court held in General Building Contractors, supra, U.S. at p. 396-397, a court must look to both the language and intent of the statute (here, the DOT regulations) in issue. In the present case, the Regulations' plain language and administrative history make clear that Respondent has a non-delegable duty to Mr. Carroll (and his fellow tested employees) concerning all aspects of the drug testing procedure. That language and history show that the drug test regulations are aimed, not only -- as the lower courts improperly limited it -- to protect the public (an unquestionable objective), but also to protect the interests of the employee being tested.

The Regulations' express purpose is "to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage." 49 C.F.R. Sec. 391.81. The individual driver's safety and well-being are equally implicated with that of the public by these regulations: the driver (not just the public) benefits from reduced highway accidents, reduced fatalities, injuries and property damage, especially where such accidents, fatalities, injuries and property damage could occur to the driver.[6]

The impairing effects of drugs upon the drivers themselves and the substantial risks to public safety posed by drivers who use drugs underlie the compelling government interest in the promulgation of these regulations. Federal Register, Vol. 53, # 224, Nov. 21, 1988, at p. 47136.

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6. In fact, should the Court permit the Ninth Circuit's opinion to stand, not even the general public will be served since a Federal Express courier who is using cocaine and whose test sample was confused for that of Petitioner will be allowed to continue to operate as a courier for Respondent.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves ..." Skinner, supra, U.S. at p. 621 (emphasis added)

shows that the duty imposed by the regulations upon Respondent is owed not only to the public but also to tested employees such as Mr. Carroll.

The administrative history of these regulations makes clear that they were issued to specifically protect the rights of the individual employees being tested. "The intent of the Guidelines [i.e., Regulations] is to safeguard the accuracy of test results and the privacy of individuals who are tested." Federal Register, Vol. 53, # 224, Nov. 21. 1988, at p. 47002 (emphasis added). The specific regulations governing collection of urine samples are:

> "carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important safeguards, including privacy during collection under most types of tests..." (Federal Register, Vol. 53, # 224, supra, at p. 47137)

> "Finally, drug testing will **protect the health and safety of the employees of motor carriers** and other users of the highway system through the early identification and referral for treatment of workers with drug use problems." Federal Register, Vol. 53, # 224, at p. 47135 (emphasis added).

Indeed, "[t]he need to assure the protection of individual rights within the context of a drug testing program" is a major concern of the these regulations (Federal Register, Vol. 53, # 69, April 11, 1988, at p. 11970).

It is clear, therefore, from the Regulations' express language and administrative history, and this Court's own prior holdings, that the federal regulations impose on Respondent a duty to Mr. Carroll and his fellow employees, not just to the public (as the Ninth Circuit and District Court erroneously held). Certiorari should be granted, therefore, to give full force and effect to the DOT regulations to ensure that the rights of all tested employees nationwide are protected. Respondent is not free to divest itself or otherwise compromise by contract, the authority

conferred by these regulations (Skinner, supra, U.S. at p. 615).

If the Ninth Circuit's opinion is permitted to stand, this Court will allow employers throughout this country to disregard the requirements of federally mandated drug testing, to divest themselves of all responsibility and liability for violations of such regulations, simply by delegating the actual operation of the collection to third parties collection site personnel. Such delegation of responsibility is in clear contradiction to the Regulations' express provisions and would, if permitted to stand, totally undermine the effectiveness of those regulations. 49 C.F.R. 40.1; 391.111(b).

The Ninth Circuit's decision, relying as it does upon California common law, and ignoring the express terms and provisions of the governing federal regulations, finds no support in the language or intent of those regulations. It ignores the DOT's explanatory statements in promulgating these regulations, set forth in the Federal Register, and proceeds as if those statements did not exist.

Certiorari should be granted and the summary judgment entered below reversed, to insure that the regulations are fully effective. Random drug testing under the DOT regulations is the "responsibility of motor carriers." Federal Register, Vol. 53, # 224, Nov. 21, 1988, at p. 47134; 49 C.F.R. Sec. 391.111(b); 40.1. This Court should not tolerate Respondent's attempt to avoid responsibility for compliance with the regulations by delegating, not only collection and testing of its employees to third parties collection site personnel, but also responsibility for compliance with the regulations as well.

Non-delegable duties are a major exception to the general rule that a hirer of an independent contractor is not liable for the acts and omissions of the contractor. West v. Atkins (1988) 487 U.S. 42,56. The DOT Regulations impose a definite, affirmative duty upon Respondent by reason of its employment relationship with Mr. Carroll and its other employees, to ensure that the random drug tests it requires its employees to take conform with the specific procedural requirements of the said regulations (49 C.F.R. Sec. 391.111(b), 40.1). Thus, Respondent may not properly escape liability for its failure to perform that duty by its mere use of collection site personnel, whether that third party be an independent contractor or not.

This Court has recognized in the sphere of constitutional rights that the concept of a duty imposes upon the principal not merely an obligation to exercise care in his own activities, but also to answer for the well being of those persons to whom the duty runs. This duty is not

discharged by using care in delegating it to an independent contractor. The non-delegable duty doctrine creates an exception to the common-law rule that a principal normally will be liable for the tortious conduct of an independent contractor. General Building Contractors, supra, U.S. at 395-397 (duty under 28 U.S.C.S. 1981); West, supra, at p. 56 (nondelegable duty under Eighth Amendment). It is an affirmative obligation to ensure the protection of the person(s) to whom the duty runs. In West, supra, U.S. at p. 56, this Court held that where a government entity, there the State of North Carolina, contracts with an independent contractor to provide services required by the federal constitution (there, medical services to inmates at a state-prison hospital):

> "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights (ftnt). The State bore an affirmative obligation to provide adequate medical care to West [the plaintiff prisoner]; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract."

> "if [contracting out prison medical care to an independent contractor], were the basis for delimiting Sec. 1983 liability, 'the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied.'" West, supra, U.S. at p. 56 n. 14, L. Ed 2d at p. 54 n. 14.

Like the State in West, supra, Respondent here (acting as a federal agent for purposes of random drug test required by the DOT regulations; see Skinner, supra, U. S. at pp. 614-616) must comply with the mandate of federal law (in West, supra, the Eighth Amendment; here, the Fifth Amendment and DOT regulations). Just as the Eighth Amendment imposed non-delegable duties upon the state in West, supra,

to the plaintiff prisoner therein, here the Fifth Amendment and DOT regulations impose non-delegable duties upon Respondent to Mr. Carroll and his fellow tested employees.

Like Mr. Carroll, the plaintiff in West, supra, was at all times free to sue the independent contractor (there, the physician who provided medical services to the state prison inmates). Such freedom, however, did not free the State (and should not free Respondent here) from its own responsibility and liability to the plaintiff.

A non-delegable duty exists here because of the "'great importance to the public of performance of the particular duty at issue'" in the performance of the random drug test in issue, in preventing injury from individuals who operate transportation vehicles under the influence of drugs (E.R. 614). However, that duty runs to the individual employee (including Carroll), not just to the public, "to protect [such] drug test subjects from the improper administration of the drug test." (contra E. R. 614) (see 49 C.F.R. Sec. 391.111(b), 40.1) and the administrative history, detailed above). The fact that Respondent's "primary business" is not drug testing (E.R. 615) provides no proper basis for shielding Respondent from liability imposed by the Regulations themselves.

The fact that an employer may have a "compelling reason" for using an independent contractor; namely, that the contractor is experienced in the detailed operation of drug testing, while the employer is not, does not abolish or otherwise limit the Regulations' requirements that the employer is under a non-delegable duty regarding drug testing of its employees. 49 C.F.R. Sec. 40.1, 391.111(b)).

Certiorari should, therefore, be granted to enforce the responsibility and liability imposed by the DOT/FHWA regulations upon employers (including Respondent here), so that employers may not circumvent the non-delegable duty imposed upon them to their tested employees by the Regulations, by contracting with third parties to act as collection site personnel in the collection of drug-test specimens from employees. Granting the instant petition will place employers throughout this nation on clear notice that the Regulations mean what they say, that the employer remains responsible for compliance with the regulations, regardless of whether they or a third party conducts the actual operation of the test.

If the Ninth Circuit's opinion is permitted to stand, employers will not be responsible for ensuring compliance of their contractors and collection site personnel with the requirements of the DOT regulations. The regulations will truly become ineffective. This must not be

permitted to occur. Certiorari should, therefore, be granted.

> "No driver shall be on duty [i.e., "all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work"] if the driver tests positive for use of controlled substances...". 49 C.F.R. 391.95(b).

Under compulsion of the federal regulations (App. 19-24, Op. at p. 5315), and pursuant to its own internal policy, Respondent terminated Petitioner's employment on the basis that he allegedly tested positive for cocaine following his random drug test. Such termination, a direct result of the violations of Petitioner's due process rights during the collection of his drug test sample, was a violation of Petitioner's rights to substantive due process. Davis, supra (former employee had right under Fifth Amendment's substantive due process clause not to be wrongfully terminated from employment by a federal actor); Rendell-Baker v. Kohn (1982) 457 U.S. 830,840-43 (private party's termination of employee under compulsion of law is an action under color of law). Respondent must be held liable in damages for that violation. Bivens, supra.

Since the procedures used in collecting Mr. Carroll's test sample did not comply with the DOT/FHWA regulations, the drug test sample which tested positive cannot be proven to have come from him. The violations which occurred during the collection of Carroll's test samples (e.g., lack of proper chain of custody) vitiated the reliability and legitimacy of his entire drug test and the results thereof. The results allegedly obtained lack all credibility in light of these violations. Respondent could have no good faith belief that the samples which tested positive came from Mr. Carroll, especially in light of the fact that he put Respondent on notice during his grievance of his termination of the vitiating deficiencies of that collection (especially the lack of a proper chain of custody).

Mr. Carroll presented ample affirmative evidence below (see Response to Defendant's Separate Statement Of Undisputed Facts (E. R. 346-357) and supporting Declaration of Daniel Ray Bacon (E.R. 357-591)) from which a jury might find that he did not test positive for cocaine, that the samples which tested positive did not come from him and were not his samples, that he submitted such evidence to his

employer during his grievance of his termination, and, therefore, that Respondent was not "[p]ossessed of the knowledge of Carroll's positive test result" (Op. p. 5315) and did not act in good faith when it terminated Carroll's employment (ibid).

Since a reasonable jury could return a verdict in Carroll's favor regarding the factual basis of his termination, a genuine issue of material fact regarding the factual basis for Mr. Carroll's termination exists which prohibits entrance of summary judgment on his termination claim. Anderson v. Liberty Lobby, Inc. (1986) 477 U. S. 242,257.

Contrary to the Ninth Circuit's unsupported holding (App. 24, Op. p. 5315), Respondent's Drug-Free Workplace Policy (E.R. 25-48; see especially E.R. 28, "Termination") created an implied agreement that it would not terminate Carroll's (or any employee's) employment because of testing positive on a drug test unless the employee did, in fact, test positive. As the District Court properly found below:

> "a trier of fact could determine that an implied term of the parties' agreement is that the Policy only justifies termination for cause." (E.R. 168, CR 11:9-11).

In terminating Carroll's employment, Respondent expressly stated that he was being terminated for cause pursuant to the Policy (E.R. 168, CR 11:1-6; E. R. 61, 62). Having invoked the Policy as grounds for Carroll's termination, Respondent foreclosed its ability to rely on Carroll's previous at will status. (ER at 168, Opinion of District Court 2-25-94).

Respondent's good faith belief that good cause existed for Carroll's termination was not a substitute for good cause when its belief was, as here, factually incorrect. Should the jury find that Carroll did not test positive, Respondent erred in concluding that he did so. In that case, good cause for termination was lacking, and Respondent breached the contract, irrespective of any good faith belief on its part. Sanders v. Parker Drilling Co., 911 F.2d 191,194-195 (9th Cir., 1990) (factual question exists, requiring trial, where employee denies alleged misconduct alleged).

Petitioner had a cognizable property interest in his employment with Respondent, a legitimate claim of entitlement in remaining at his old job under Respondent's policy implementing the DOT regulations. Board of Regents v. Roth (1972) 408 U.S. 564. Carroll's property interest was violated by Respondent's termination of his employment

without good cause.

The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. Bush v. Lucas (1983) 462 U.S. 367,378. That damages may be obtained for injuries consequent upon a violation of the Constitution by federal actors is settled by this Court. Bivens, supra, U.S. at 395. Petitioner is entitled to damages for the injuries he suffered as a result of Respondent's violation of his Fifth Amendment rights in his job.

Certiorari should, therefore, be granted to reverse the summary judgment improperly entered against Carroll on his termination claim and remand the action for trial.

CONCLUSION

For the reasons stated above, Certiorari should be granted in the instant case and the summary judgment entered below be reversed, in random drug testing of employees.

Dated: October 9, 1997

Respectfully submitted,

/S/ Daniel Ray Bacon

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Carroll, III, *Plaintiff-Appellant,*	)	
	)	No. 95-16603
v.	)	D.C. No.
	)	CV-93-4243-SC
Federal Express Corporation, a Delaware corporation, *Defendant-Appellee.*	)	OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
November 7, 1996--San Francisco, California

Filed May 6, 1997

Before: Paul H. Roney,* Robert R. Beezer, and
Stephen S. Trott, Circuit Judges

Per Curiam Opinion

SUMMARY

Labor and Employment/Drugs and Alcohol

The Court of appeals affirmed a judgment of the district court. The

* The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

Court held that an employer is not liable for procedural errors in a federally mandated drug test performed by an independant contractor.

Appellant Richard Carroll worked for appellee Federal Express Corporation. Department of Transportation (DOT) rules require motor carriers to maintain a drug-free workforce and establish drug-testing procedures. The regulations require employers to maintain records and use an outsider to conduct drug testing. The stated purpose of the regulations is to reduce highway accidents that result from driver use of controlled substances. The regulations also state that the intent of the drug-testing guidelines is to safeguard the accuracy of the test results and the privacy of individuals who are tested.

Federal Express hired Options and Choices (OAC) as an independent contractor to conduct random drug tests. Carroll tested positive for cocaine and was fired.

Carroll sued Federal Express, alleging constitutional and state-law claims arising out of his discharge. He contended that his test was wrong, which resulted from OAC's failure to comply with the chain-of-custody requirements established by DOT regulations. He argued that DOT drug-testing procedures were the wellspring of a nondelegable duty possessed by Federal Express, making Federal Express vicariously liable for the actions of OAC.

The district court granted summary judgment in favor of Federal Express, concluding that it could not be held liable for the actions of its independent contractor, OAC.

[1] Under California law an employer generally is not liable for the tortious acts of an independent contractor, unless the employer possesses a nondelegable duty. If the performance of a duty of care is of great importance to the public, it is nondelegable.

[2] Although DOT expressed concern for the privacy of test results, it did not necessarily follow that the regulations imposed a nondelegable duty. If the regulations imposed any duty of great importance to the public on Federal Express, that duty existed for the

benefit of the general public, not for the benefit of tested individuals. [3] The regulations may produce the collateral benefit of increasing safeguards for the privacy of tested individual, but that is not their *raison d'etre*

[4] Federal Express discharged its responsibilities under the regulations. Carroll may have had a cause of action, but it did not lie against Federal Express.

[5] Possessed of the knowledge of Carroll's positive test result, Federal Express acted in good faith within the terms of its policy when it erminated Carroll. Carroll could not rightfully assert that Federal Express breached an implied obligation when it terminated him because of the alleged errors of OAC.

COUNSEL

Daniel Ray Bacon, San Francisco, California, for the Plaintiff-appellant.

J. Russell Stedman and Thomas Beer, Barger & Wolen, San Francisco, California for the defendant-appellee.

OPINION

PER CURIAM:

Federal Express Corporation ("Federal Express") fired Richard Carroll, III ("Carroll") from his job as a courier after he tested positive for using cocaine following a random drug test required by Department of Transportation ("DOT") regulations, 49 C.F.R. Secs. 391.109, 391.111 ("DOT regulations"). Carroll sued Federal Express alleging constitutional and state law claims arising out of his termination. We have jurisdiciton pursuant to 28 U.S.C. Sec. 1291, and we affirm.

Carroll denies ever having used cocaine. He contends his testing positive on a drug test administered by an independent contractor, Options and Choices ("OAC"), resulted from OAC's failure to comply with the chain of custody requirements established by DOT regulations. See 49 C.F.R. Secs. 40.23-40.39. Although he signed a certification form attesting that his urine samples had been sealed in his presence with a tamper-proof seal, Carroll now asserts that he signed the form before giving his sample. He denies that the sample was taken in his presence. He further contends that his ample was left in an office accessible to tother Federal Express employees. Carroll maintains that these alleged errors in handling his sample resulted either in his sample being confused witht that of another employee who tested positive or his sample being altered after he left the testing area.

Carroll asserts that Federal Express is vicariously liable for violations of his procedural due process rights resulting from OAC's failure to follow the DOT regulations. He also argues that Federal Express is directly liable for breach of contract and breach of the covenant of good faith and fair dealing, because Federal Express terminated him on the basis of a flawed drug test.

The district court granted summary judgment in favor of Federal Express, concluding that, as a matter of law, Federal Express could not be held liable for the actions of its independent contractor, OAC. We review a grant of summary judgment de novo. *Bagdadi v. Nazar* 84 F. 3d 1194, 1197 (9th Cir. 1996).

[1] Under California law, an employer generally is not liable for the tortious acts of an independent contractor.[1] See e.g., *Privette*

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1. The legal basis of Carroll's procedural due process claim is ambiguous. In his complaint, Carroll alleges that Federal Express, by terminating his employment, "caused [him] to be denied his rights, privileges and immunities guaranteed by the Fifth Amendment to the Unites States Constitution, namely his right to procedural due process in the taking of his urine sample and his substantive due process right to his job." This allegation can be interpreted either as a claim under 42 U.S.C. Sec. 1983 for violation of Carroll's civil rights, or as a claim under California law for termination in violation of public policy. See, e.g., *TRW, Inc. V. Superior Court of Los Angeles County* 31 Cal. Rptr. 2d 460 (Cal. Ct. App. 1994) (evaluating claim that employee's termination violated public policy stated in Fifth Amendment).

v. Superior Court, 5 Cal. 4th 689, 695 (Cal. 1993). One exception to this rule is when the employer possesses a non-delegable duty:

> Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor.

Van Arsdale v. Hollinger, 68 Cal. 2d 245, 251 (1968). California courts have considered a number of factors in determining whether or not an employer has a non-delegable duty. *Id.* at 253.

> Some of the principal ones are [(1)] that the enterprise, notwithstanding the employment of the independent contractor, remains the employer's because he is the party primarily to be benefited by it, [(2)]that [the employer] selects the contractor, is free to insist upon one who is financially responsible, and to demand indemnity from him, [(3)] that the insurance necessary to distribute the risk is properly a cost of the employer's business, and [(4)] that the performance of the duty of care is of great importance to the public.

Id.

Nevertheless, even if Carroll's claim is based on section 1983, we look to principles of California law to determine whether Federal Express is vicariously liable for the actions of its independent contractor. Section 1988 of Title 42 provides that in all civil rights cases:

> where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutues of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the Unites States, shall be extended to and govern the said courts in the trial and disposition of the cause.

Thus, the source of Carroll's cause of action is not determinative of our choice of law.

Carroll contends that the fourth factor is present in this case and provides a basis for finding Federal Express vicariously liable for the actions of OAC. Carroll argues that the DOT regulations establishing the Department's drug testing procedures are the wellspring of a non-delegable duty. Specifically, he points to several DOT statements in the Federal Register that explain the drug testing regulations it promulgated. The DOT stated that "the intent of the Guidelines is to safeguard the accuracy of test results and the privacy of individuals who are tested." *Procedures for Transporation Workplace Drug Testing Programs*, 53 Fed. Reg. 47,002, 47,002 (1988). Further, the DOT indicated that its testing procedures were designed to "protect individual privacy, ensure accountability and integrity of specimens, [and] require confirmation of all positive screening tests." *Controlled Substances Testing*, 53 Fed. Reg. 47134, 47135 (1988).

In addition, Carroll cites *Maloney v. Rath*, 69 Cal 2d 442, 446-47 (1968), for the proposition that California law supports our imposing a non-delegable duty on Federal Express. In *Maloney*, the California Supreme Court held that the duty to maintain automobile brakes so that they complied with the California Vehicle Code was non-delegable. *Id.* at 446. The court reasoned that

> [o]ne who by statute or by administrative regulation is under a duty to provide specific safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Id. at 448.

[2] Although the DOT expressed concern for the privacy of test results, it does not necessarily follow that the regulations impose a non-delegable duty. Whether they do can only be determinedby examining the administrative structure under which Federal Express and other motor carriers operate. See C.F.R. Secs. 391.81 - 391.125. We conclude that, if the regulations impose any duty of great importance to the public on Federal Express, that duty exists for the benefit of the general public, not the benefit of tested individuals.

[3] Notwithstanding the explanatory statements in the Federal Register, the sole stated purpose of the regulations establishing drug testing procedures for motor carriers is "to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage." 49 C.F.R. Sec. 391.81. The regulations requiring motor carriers to maintain a drug-free workforce may produce the collateral benefit of increasing safeguards for the privacy of tested individuals, but their raison d'etre is the protection of the general public. *See id.*

[4] Further, the administrative framework established by the regulations expressly contemplates employer delegation of responsibility for many aspects of testing.[2] That framework does not support the argument that it exists for the purpose of protecting the rights of tested individuals. *See Maloney*, 69 Cal. 2d at 448. Federal Express discharges its responsibilities under the regulations by maintaining the records required of it and employing a licensed

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2. The employer bears responsibility, inter alia, for: employing or using a Medical Review Officer ("MRO") to conduct testing. 49 C.F.R. Sec. 391.86: maintaining records, for purposes of inspection by the Federal Highway Administrator. 49 C.F.R. Sec. 391.87: testing drivers when the employer has reasonable cause to suspect drug use, 49 C.F.R. Sec. 391.99: testing driver applicants before hiring or using them, 49 C.F.R. Sec. 391.103: and testing all drivers randomly biennially, 49 C.F.R. Sec. 391.105

49 C.F.R. Sec. 391.86 defines a MRO as "a licensed doctor of medicine or osteopathy with knowledge of drug abuse disorders that is employed or used by a motor carrier to conduct drug testing." The MRO bears responsibility, inter alia, for: conducting testing, 49 C.F.R. Sec. 391.86: notifying tested individuals of the results, 49 C.F.R. Sec. 391.87: maintaining test result records, *Id.*, maintaining the confidentiality of those records, 49 C.F.R. Sec. 391.89.

Carroll points to regulations that require employers to ensure that testing comports with DOT general guidelines for drug testing found in 49 C.F.R. Sec. 40 in support of his argument for vicarious liability for Federal Express. *See* 49 C.F.R. Secs. 391.99, 391.111 and 391.113. Because the motor carrier regualtions contmeplate delegation for many aspects of testing, as noted *supra*, we conclude that the most sensible reading of the regulations in question is that an employer may discharge its responsibility for ensuring their drug testing program comports with 49 C.F.R. Sec. 40 in two ways. First, an employer can choose to administer its own testing program within the guidelines of 49 C.F.R. Sec. 40. Second, an employer may discharge its responsibility under the regulations in question by hiring licensed outsiders to perform testing. *See* 49 C.F.R. Secs. 391.86-391.89.

outsider to conduct its drug testing. Carroll may have a cause of action, but it does not lie against Federal Express.

II

Carroll contends that even if it cannot nr held vicariously liable for the alleged errors of OAC, Federal Express should be held directly liable because it wrongfully terminated him. Carroll argues that Federal Express's testing policy created an impled obligation not to fire him except for cause, i.e. for a positive drug test that was tainted with error. We reject Carroll's claim that Federal Express's testing policy created such an implied contract.

[5] The DOT regulations for motor carriers require that drivers who test positive not "be on duty." 49 C.F.R. Sec. 391.95. Federal Express' policy implementing those regulations provided for the termination of drivers who tested positive. Possessed of the knowledge of Carroll's positive test result, Federal Express acted in good faith within the terms of its policy when it terminated Carroll. As such, Carroll cannot rightfully assert that Federal Express breached an implied obligation when it terminated him because of the alleged errors of OAC.

AFFIRMED.

FILED
August 15 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD CARROLL III,	)	
	)	
Petitioner/Plaintiff,	)	No. C-93-4243-SC
	)	
v.	)	
	)	
FEDERAL EXPRESS CORPORATION,	)	
	)	ORDER RE:
Respondent/Defendant.	)	SUMMARY
	)	JUDGMENT 43

ENTERED IN
CIVIL DOCKET 8/15/95

I. INTRODUCTION

Defendant, Federal Express, brings this summary judgment motion arguing that no liability exists for terminating plaintiff, Richard Carroll III, based on his positive drug test. Specifically, defendant contends that even if the test was improperly administered by Option and Choices, the test administrator, it is not vicariously liable for the alleged acts or omissions of an independent contractor.

II. LEGAL STANDARD

Summary judgment is proper only when there is no genuine

issue of material fact and, when viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c): Jung v. FMC Corp., 755 F. 2d 708, 710 (9th Cir. 1095). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex Corp. V. Myrtle Nell Catrett, 477 U.S. 317 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be received only by a finder of fact because they may reasonably be in favor of either family." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence then would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.,

818 F 2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

Bearing in mind that the evidence should be viewed in the light most favorable to Carroll, as the non-moving party, the relevant facts are summarized below.

III. **FACTS**

Plaintiff, Richard Carroll III ("Carroll") was employed by defendant Federal Express Corporation ("Federal Express") for eight years, the last four working as a courier.

Pursuant to United States Department of Transportation Regulations (49 CFR Secs. 40.1 et seq., and Sass. 391.91 et seq.) ("DOT Regulations"), Federal Express established a "Fitness for Duty/Drug-Free Workplace" policy (the "Policy") for its employees. Both DOT regulations and the Federal Express policy set forth certain procedures to be followed in the administration of random drug-testing in order to insure the integrity of drug testing samples. These procedures include accounting for the chain of custody of each urine sample by tracking its handling and storage from point of specimen and allowing for a confirmatory second analytical procedure.

Under the Federal Express policy, an employee, randomly

selected by a computer program, is directed by his manager to report to a testing location on Federal Express property. Options and Choices, Inc. ("Options") does the actual collection of the drug test samples. After collection, the drug test subject signs a certification form, created by Federal Express, that accompanies the urine sample and certifies the chain of custody and its integrity. Federal Express then takes possession of the drug test sample and assumes responsibility for delivery to either of the two independent laboratories, Roche Laboratories or MedExpress, responsible for chemical analysis.

Options, the provider of the drug test sample collection services[1] under a contract which declares them to be an independent contractor, employs trained personnel to administer the collection procedures according to DOT regulations and Federal Express guidelines.[2] Federal Express' Drug-Free Workplace Program ("DFWP") is responsible for insuring that Options follows DOT regulations when screening Federal Express employees. To this end,

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1. In addition to drug testing, Options provides various other medical services for Federal Express under the same contract, such as physical exams, health assessments, Worker's Compensation assessments, and pregnancy counseling.

2. The Federal Express Guidelines essentially mirror DOT regulations.

DFWP personnel periodically audit Options collection sites to observe drug testing in progress.

In accordance with its policy, Federal Express instructed its employee, Carroll, to submit to a urinalysis drug test in South San Francisco, California, on November 30, 1992. At the test, Carroll signed and dated the chain of custody certification form, certifying that it was his urine, that the specimen bottle was sealed with a tamper proof seal in his presence, and that the information provided was correct. Carroll alleges that he signed the form prior to giving the sample and that he did not see the sample sealed in his presence or the certification form attached. Furthermore, he argues that the certification form is incorrect in that it indicates the testing center was Foster City, not South San Francisco. Finally, he argues that the specimen bottle is merely tamper resistant not tamper proof and that after collection, his sample was placed in a Federal Express manager's office accessible to employees. While Carroll implies that the specimen could have been altered, he offers no actual proof to substantiate that such an event occurred.

Carroll's urine was separated into two parts to serve as a "split sample." Both of the split samples tested positive for the

presence of cocaine.

Based on the test results, Federal Express terminated Carroll's employment on December 18, 1992. Carroll appealed his termination through Federal Express' internal grievance procedure. Federal Express denied Carroll's appeal.

Carroll maintains that Federal Express did not comply with federal Department of Transportation regulations or its own internal guidelines regarding the chain of custody required for the sample during testing because he signed the form prior to the sample and it was not sealed in his presence. Carroll claims that this alleged procedural error compromised the reliability of the test results. Carroll further claims the positive test results are erroneous as he has never used cocaine or any other controlled substance.

Following Carroll's termination, both parties appeared at a hearing at the state unemployment office. At that hearing, Federal Express informed the hearing officer that Carroll had been terminated for cause due to the positive test results.

IV. DISCUSSION

Federal Express contends that it cannot be vicariously liable for Options' allegedly improper administration of the drug test

because it is an independent contractor. Carroll argues that Options is not an independent contractor for two reasons: (1) federal Express' drug testing responsibility, imposed by DOT regulations, is a non-delegable duty; and (2) Federal Express exercised sufficient control over Options' drug test collection operation to nullify the independent contractor relationship and reinstate vicarious liability. Finally, Carroll contends that this complaint for unlawful termination is not limited to the manner and mode in which his drug sample was collected and therefore, even if Options is an independent contractor, summary judgment is still inappropriate.

The general rule absolving an employer of liability for the tortious acts of an independent contractor has been eroded by numerous exceptions under California law. Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309, 1311-12 (9th Cir. 1994). Some of the principle reasons for departing from the general rule is that the enterprise, notwithstanding the employment of the independent contractor, remains the employer's enterprise because he (1) is the party primarily to be benefited by it, (2) can choose whether or not to select a contractor who is financially responsible, and (3) can obtain the insurance necessary to distribute the risk which is properly a cost

of the employer's business. Van Arsdale v. Hollinger, 68 Cal. 2d 245, 253 (1968).

Plaintiff contends that Federal Express, the primary beneficiary of the work performed, should retain liability because the general rule of non-liability "can now be said to be general only in the sense that it is applied when no good reason is found for departing from it." Sugimoto, 19 F. 3d at 1312; Restatement (Second) of Torts Sec. 409, comment b. Federal Express contends that a compelling reason exists for using an independent contractor, namely, that Options is qualified to provide a service that Federal Express, as solely an overnight express mail carrier, is not equipped to render. This court agrees, and thus finds that the general rule is applicable unless another exception can be found.

A. Non-Delegable Duty

Non-delegable duties are a major exception to the general rule. "Where the employer is under a duty to do certain work carefully, or maintain property in safe condition, he cannot escape responsibility by delegating the work to an independent contractor." Delgado v. Garcia (W.C.) & Associates, 212 Cal. App. 2d 5, 8 (1963). Duties that have been found to be non-delegable include

work done under public license, activities creating a nuisance, or where an owner or possessor of land must perform a duty. 6 Witkin, Summary of California Law, "Torts", Sec. 1018-20. Carroll cites authority holding non-delegable duties exist where (1) the "intrinsically dangerous" work carries "a peculiar risk;" Van Arsdale, 68 Cal. 2d 245; or is "attended with considerable risk;" Synder v. Southern Cal. Edison Co., 44 Cal. 2d 793 (1961); (2) a statute affirmatively mandates an action in order to protect the public from fraud; Rob-Mac Inc. v. Department of Motor Vehicles, 148 Cal. App. 3d 793 (1983); (3) it is necessary to reallocate the loss away from an insolvent party; Barry v. Raskov, 232 Cal. App. 3d 447 (1991); or (4) a public entity must comply with constitutional mandates; West v. Atkins, 487 U.S. 42 (1988).

Unlike a public entity, Federal Express' drug testing obligation does not become non-delegable in order to ensure compliance with a constitutional mandate. Accordingly, that precedent is inapplicable in the instant case.

In determining the applicability of the peculiar risk doctrine, the court considers whether the work contracted for "involves a risk that is 'peculiar to the work to be done,' arising either from the nature

or the location of the work and 'against which the reasonable person would recognize the necessity of taking precautions.'" Privette v. Superior Court, 5 Cal 4th 689, 695 (1993). Construction or road repair work are typical examples of activities that fall within this dotrine. Drug testing does not, by its nature or location, involve inherent risks of injury to the subject that require the imposition of liability to an employer of an independent contractor for failing to recognize and undertake additional precautions. Thus, the doctrine is inapplicable.

A statutory duty, imposing on an employer an "affirmative duty by reason of his relationship with others," is a non-delegable duty. Rob-Mac, 148 Cal. App. 3d at 797. It is "the great importance to the public of performance of the particular duty at issue," Id. at 798, that determines whether the statutory mandate rises to a level of a non-delegable duty. In Rob-Mac, the statute imposed a duty on used car salemen not to cause any person to suffer loss or damage by reason of fraud in the sale of a vehicle. This duty could not be circumvented by hiring independent contractors to sell the cars. In the) se at hand, the great importance of the statute to the public is to prevent injury from individuals who operate transportation vehicles

under the influence of drugs. Therefore, even if a non-delegable duty exists, it is a nondelegable duty to protect the public from individuals operating transportation under the influence of drugs, not a non-delegable duty to protect drug test subjects from the improper administration of the drug test.[3] Milsap v. Federal Express, 227 Cal. App. 3d 425, 427 (1991) (holding that a duty can be non-delegable toward one type of party while delegable towards another). Moreover, unlike the used car salesman whose independent contract required the performance of the non-delegable duty, the primary business of the employer, Federal Express' independent contractwas for services that they were not qualified to perform nor in the business of providing. Consequently, the court finds that Federal Express does not have a non-delegable duty to perform drug testing of its employees.

B. Employer Control

Carroll contends that Federal Express, by its intimate involvement in the drug testing procedure, essentially vitiated the independent contractor relationship. Specifically, Carroll points to the fact that the testing took place at Federal Express facilities,

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3. Any clerical error mislabeling the testing site as South San Francisco does not violate the DOT regulations.

according to guidelines produced by Federal Express. Moreover, Federal Express has, on occasion, monitored the administration of the drug test and given directives to the test administrators when procedures fail to meet Federal Express guidelines. Finally, Federal Express takes possession of the drug test sample and assumes responsibility for delivery to either of the two independent laboratories responsible for chemical analysis.

Both parties concede that, in the case at hand, whether an independent contract relationship exists is a question of law for the court to decide. Toyota Motor Sales U.S.A., Inc., v. Superior Court, 220 Cal. App. 3d 864 (1990). "An independent contractor is one who, in rendering service, exercises an independent employment or occupation and represents his employer only as to the results of his work, and not as to the means whereby it is accomplished." Green v. Soule, 145 c. 96, 99 (1904)

The degree of control is the most determinative factor in assessing whether an independent contractor relationship is nullified. Central to the general rule of independent contractor non-liability is the "recognition that a person who hired an independent contractor had 'no right of control as to the mode of doing the work contracted

for .'" Privette, 5 Cal 4th at 693. General supervisory control must be distinguished with control over the details. An owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract - including the right to inspect . . . , the right to make suggestions or ., the right to prescribe alterations or deviations in the work . . . - without changing the relationship.

McDonald v. Shell Oil Co., 44 c. 2d 785, 790 (1955).

Federal Express merely retained broad general supervisory control over options' performance of drug testing. The guidelines provided to options, regardless of any deviations from DOT regulations, as well as the certification form, were simply created to insure compliance with federal law. Moreover, and periodic audits undertaken by Federal Express and any recommendations or directives that resulted, did not affect the independent contractor relationship. Federal Express' delivery of the sample after collection, and therefore, after completion of the services required under the contract, also did not change the relationship. Finally, many independent contracts take place on the employer's site, i.e. construction work, without affecting the nature of the relationship.

Consequently, the degree of Federal Express' control over options' operations suggest that the independent contractor relationship is still valid.

Other factors traditionally employed by courts also support the validity of the independent contractor relationship. Most significantly, contractors engaged in distinct occupations are generally regarded as independent contractores. Smith v. Department of Employment, 62 cal.App. 3d 206, 211 (1976). Federal Express is solely an express mail courier service, distinct from options, which is solely a provider of medical related services. Furthermore, the fact that options is engaged in a occupation requiring special skills, i.e. medical training, and is distinct from Federal Express' business, supports a finding of independent contractor. Id. Finally, while the form of contracting is not controlling, it is indicative and bolsters the claim of an independent contract. Empire Mines Co. V. California Emp. Com., 28 c. 2d 33, 45 (1946). The Federal Express options contract identifies the relationship between the parties as independent contractors. Accordingly, the court finds that Federal Express' interaction with Options was insufficient to alter the independent contract relationship.

C. Wrongful Termination

Carroll contends that even if Options is an independent contractor, summary judgment against Federal Express is not appropriate because his complaint for unlawful termination is not limited to the manner and mode in which his drug test sample was collected. However, both of Carroll's split drug samples tested positive. Furthermore, no arguments have been made challenging the actual test results of the samples submitted. Finally, Federal Express' termination cited the positive drug test result as the sole reason for Carroll's dismissal. No allegations have been brought challenging this declaration or the subsequent grievance procedures available for challenging the termination. Carroll's claim for wrongful termination arises solely from his allegation that the drug test procedure, and therefore his positive result, was flawed. There is no other basis out of which the alleged wrongful termination could have arisen. Therefore, this argument must be rejected.

V. CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that Defendant's summary judgment motion is GRANTED.

IT IS SO ORDERED.

Dated: August 14, 1995

\s\ Samuel Conti
UNITED STATES DISTRICT JUDGE

FILED

August 15 1995

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD CARROLL III,	)	
	)	
Petitioner/Plaintiff,	)	No. C-93-4243-SC
	)	
v.	)	
	)	
FEDERAL EXPRESS CORPORATION,	)	
	)	ORDER RE:
Respondent/Defendant.	)	JUDGMENT 44
	)	

ENTERED IN
CIVIL DOCKET 8/15/95

In accordance with the Order granting defendants Motion for Summary Judgment issued on August 14, 1995, it is hereby ordered, adjudged, and decreed that judgment be entered in favor of defendant and against plaintiff. Plaintiff shall take nothing on the complaint.

IT IS SO ORDERED.

Dated: August 14, 1995

\s\ Samuel Conti
UNITED STATES DISTRICT JUDGE

FILED
FEB 25, 1994
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICHARD CARROLL III,	)	
	)	
Petitioner/Plaintiff,	)	No. C 92-4243 SC
	)	
	)	
v.	)	ORDER RE:
	)	MOTION TO
FEDERAL EXPRESS CORPORATION,	)	DISMISS
	)	
	)	
Respondent/Defendant.	)	
	)	

I. INTRODUCTION

Pursuant to United States Department of Transportation regulations and its own policy guidelines, defendant Federal Express Corporation ("Federal Express") instructed its employee Richard Carroll III ("Carroll") to submit to an urinalysis drug test. Carroll submitted to the drug test and tested positive for use of cocaine. Federal Express terminated Carroll's employment based on the test results.

Carroll claims that Federal Express failed to comply with Department of Transportation regulations regarding the chain of custody required for such a drug test. Carroll further claims the positive test results are erroneous as he has never used cocaine or any other controlled substance.

In the pending motion, Federal Express seeks dismissal of each of Carroll's nine causes of action and dismissal of Carroll's petition for writ of mandamus.

II. FACTS

Pursuant to Department of Transportation regulations (49 CFR §§ 40.1 et seq., and §§ 391.81 et seq.) Federal Express established a "Fitness for Duty/Drug-Free Workplace" policy (the "Policy") for its employees. The federal regulations set forth certain procedures to be followed in the administration of the random drug-testing.

On November 30, 1992, Carroll submitted to an urinalysis drug test in South San Francisco, California. Carroll's urine was separated into two parts to serve as a "split sample." If the first sample were to test positive, the second sample could be tested to

provide confirmation of the test results.

Both of the split samples tested positive for the presence of cocaine. Based on the test results, Federal Express terminated Carroll's employment on December 18, 1992. Carroll appealed his termination through defendant's internal grievance procedure. Federal Express denied Carroll's appeal.

Carroll maintains that Federal Express did not comply with federal regulations or its own internal guidelines in failing to establish a proper chain of custody for the samples during testing. Carroll claims that this alleged procedural error compromised the reliability of the test results.

Following Carroll's termination, both parties appeared at a hearing at the state unemployment office. At that hearing, Federal Express informed the hearing officer that Carroll had been terminated for cause due to the positive test results.

III. DISCUSSION

Before reaching the merits of defendant's motion to dismiss, the court must address the issue of whether plaintiff may pursue a writ

of mandamus to overturn the conclusion of the internal Federal Express grievance procedure that the termination was proper. The court finds no authority which would allow it issue a writ of mandamus to compel reversal of the result reached by defendant's internal grievance procedure.

California law sets forth narrow circumstances in which a court may issue a writ of mandamus to compel action following a quasi-judicial determination by public entities or medical boards. See Westlake Community Hospital v. Superior Court, (1976) 17 Cal.3d 465. Carroll requests the court should extend this holding and the later holding in Holder v. California Paralyzed Veterans Assn. (1980) 114 Cal.App.3d 155, 164-65 to apply to private corporations. The court finds no persuasive reason to expand judicial oversight to the grievance procedures of private corporations. Thus, the petition for writ of mandamus is dismissed and the court proceeds to the merits of Carroll's complaint.

The Ninth Circuit has reviewed the standard for a motion to dismiss for failure to state a claim on which relief can be granted:

... a complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove

no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A complaint may be dismissed as a matter of law for two reasons; (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable theory. 2A J. Moore, Moore's Federal Practice ¶ 12.08 at 2271 (2d ed. 1982).

Robertson v. Witter Reynolds, Inc., 749 F.2d 530, 53334 (9th Cir. 1984). In determining a motion to dismiss, "all the allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." Moreover, "to dismiss, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved." Wool v. Tandem Computers Inc., 818 F.2d 1433, 1439 (9th Cir. 1987).

a. Constitutional Causes of Action

In his first, second, and fourth causes of action Carroll alleges violation of his Fourth Amendment, Fifth Amendment and privacy rights under the United States and California Constitutions. Both defendant and plaintiff treat the three causes of action listed above as being viable or subject to dismissal based on the same arguments. Federal Express argues forcefully that Carroll had no reasonable

expectation of privacy sufficient to overcome the strong governmental interest in assuring safety in transportation through random drug tests.

In response, Carroll acknowledges that the United States Supreme Court has specifically rejected Constitutional challenges to random drug testing in the transportation industry. However, Carroll maintains that while these rulings would preclude a facial challenge, they still allow a Constitutional challenges to drug testing as applied to individuals.

Reviewing the contentions of the parties, the court finds that neither approach can be applied in a blanket manner to each of the three causes of action. Rather, since the Fourth Amendment, Fifth Amendment and right to privacy each implicate distinct and separable rights, each must be addressed separately in determining the propriety of the pending motion to dismiss.

In regard to Carroll's cause of action for violation of the Fourth Amendment prohibition against unreasonable search and seizure Carroll fails to cite, nor can the court locate any authority that would differentiate this situation from the random drug testing allowed in Bluestein v. Skinner, (9th Cir. 1990) 908 F. 2d 451, 456

and International Brotherhood v. Department of Transportation, (9th Cir. 1991) 932 F. 2d 1291, 1298.

The court in International Brotherhood specifically held that the strong government interest in highway safety outweighed the Fourth Amendment privacy interests of individual truck drivers subject to random drug testing. Id. at p. 1305-1306. Carroll seeks to avoid dismissal of this cause of action by challenging random drug testing as applied to him.

The United States Supreme Court has recognized that the act of urination required for collect a drug test sample is an activity, "traditionally shielded by great privacy." Skinner v. Railway Labor Executives' Assn, (1989) 489 U.S. 602, 626. However, upon review of the facts as asserted by Carroll and viewing them in the light most favorable to him, the court finds that an improper chain of custody and erroneous test results, even if proven, do not change the Constitutional balance which allows such random drug testing. The hallmark of the Fourth Amendment is protection of a person's reasonable expectation of privacy. Whether Federal Express completes the proper forms to demonstrate chain of custody does not cause the drug testing to be any more or any less intrusive on

Carroll's reasonable expectation of privacy. Carroll performs the same physical act and is subject to the same level of intrusion regardless of chain of custody.

Similarly, erroneous test results themselves do not make the underlying drug test any more or less intrusive. The Fourth Amendment offers protection against unreasonable search and seizure, it does not provide a guarantee as to the accuracy or outcome of such search and seizure.

For many of the reasons set forth above, Carroll's fourth cause of action for violation of the right of privacy under the United States and California Constitutions must be dismissed. Aside from applying to private as well as state action, the California Constitution does not appear to offer broader privacy protection than the United States Constitution for subjects of random drug testing. see Hill v. N.C.A.A., 94 DAR 1141, Slip Op. No. S018180 (Cal. Sup. Ct. January 28, 1994). Based on the facts of this case, Carroll's fourth cause of action whether labeled as a facial or as applied Constitutional challenge must be dismissed.[1]

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1. However, the court expressly rejects defendant's position that an individual may not challenge the propriety of random drug testing as applied to him. The individual need not necessarily be part of a particular group or type of employee to invoke his rights under the Fourth Amendment or the privacy rights ensured by the United States

While Carroll cannot maintain an action under the Fourth Amendment or either Constitutional privacy protection, the Fifth Amendment right to procedural due process protects different rights. The Fifth Amendment insures no person shall be deprived life, liberty or property without due process. Due process is not a technical concept that applies fixed content to every circumstance. Instead due process is a flexible concept that calls for such procedural protections as a particular situation demands. See Mathews v. Eldridge, (1976) 424 U.S. 319.

While allegations of an improper chain of custody do not implicate the Constitutional rights discussed previously, they are at the heart of procedural due process. The allegations, if proven, would call into serious question the reliability and fairness of the results obtained.[2] Thus, Carroll may maintain his action for violation of the Fifth Amendment right to due process.

b. Breach of Department of Transportation Regulations

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and California Constitutions on an as applied basis. Rather, the facts of this particular action are insufficient to maintain such a challenge.

2. Fifth Amendment procedural due process guarantees that random drug testing be conducted in accordance with proper procedural safeguards. It does not guarantee a factually accurate test result. Thus, an erroneous test result, if proven, would not necessarily implicate violation of the Fifth Amendment. Rather, it could serve as one element of damages if Carroll can establish violation of procedural due process in the way that the drug tests were conducted.

Carroll's third cause of action alleges violation of federal Department of Transportation regulations. These regulations, 49 CFR §§ 40.1 et seq., and §§ 391.81 et seq., set forth the procedures that an employer must use in administering the mandatory drug tests.

Review of the applicable regulations reveals that they do not provide any means whatsoever for private enforcement by employees or anyone else. Rather, the regulations govern the relationship between the Department of Transportation and employers within the regulated industries, in this case defendant Federal Express.

Carroll acknowledges the absence of a private cause of action but urges the court to view the Department of Transportation regulations as an implied contractual term as between himself and Federal Express. However, the only evidence that could possibly support such incorporation is the existence of the Federal Express Policy. As set forth previously, the Department of Transportation required such a program as a matter of law. There is no evidence that Federal Express or Carroll took any steps to incorporate the federal regulations as a term of Carroll's employment. In sum, neither the Department of Transportation nor the parties took any steps to grant Carroll the right to enforce these Department of Transportation

regulations against Federal Express.[3]

c. Breach of Contract and Covenant of Good Faith and Fair Dealing

Carroll's fifth and sixth causes of action for breach of implied contract and breach of the covenant of good faith and fair dealing allege that Federal Express dismissed Carroll "for cause" under the Policy when no good cause existed.

Both parties agree that no written contract governed Carroll's employment with Federal Express. They further agree that there was no requirement that any termination of Carroll by Federal Express be for cause. The personnel manual distributed to Carroll and other employees specifies that employment is "at will."

Based on these facts, Federal Express seeks dismissal of the fifth and sixth causes of action arguing that whether or not the tests were properly performed or accurate, Federal Express did not need cause to terminate Carroll's employment. In reply, Carroll asserts that while his general employment status was at will, the language of defendant's own Policy limited its ability to terminate employees

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3. While Carroll may not state a claim against Federal Express for violation of the Department of Transportation regulations, proof of violation of the statutes would provide some evidence of a lack of procedural due process.

pursuant to random drug testing. Specifically, Carroll argues that the Policy ensures that termination pursuant to random drug testing will only be "for cause." See Thomka v. Financial Corp., (1993) 15 Cal.App.4th 877, 883 ("The mere fact that a contract is terminable at will does not give the employer an absolute right to terminate it in all cases.") citing Pugh v. See's Candies, Inc., (1981) 166 Cal.App.3d 311.

The Policy states: "An individuals employment is terminated in accordance with the Termination policy or applicable flight attendant contract provisions whenever an investigation confirms that the guidelines of the Fitness for Duty/Drug-Free Workplace policy have been violated." The Policy then lists a number of possible employee violations.

Further, in terminating Carroll's employment Federal Express specifically stated that he was being terminated for cause pursuant to the Policy. Federal Express confirmed this position by providing testimony at an unemployment hearing that Carroll had been terminated for testing positive for cocaine use.

Based on all of the facts presented and review of the language of the Policy itself, the court finds it possible that a trier of fact could

determine that an implied term of the parties' agreement is that the Policy only justifies termination for cause. See Pugh v. See's Candies, Inc., (1981) 116 Cal.App.3d 311, 321.

The court specifically rejects defendant's attempt to recast the reasoning behind Carroll's termination to fit it within the scope of the at will relationship. Termination pursuant to the Policy under allegation of drug use leaves an employee, especially in such a regulated industry, under a heavy personal and professional stigma. Having invoked the Policy as grounds for Carroll's termination, defendants foreclose their ability to rely on Carroll's previous at will status.

d. Intentional and Negligent Infliction of Emotional Distress

In his opposition brief, Carroll concedes that his seventh and eighth causes of action for intentional and negligent infliction of emotional distress are preempted by the exclusivity of the California Worker's Compensation Act. Thus, both causes of action shall be dismissed.

e. Defamation

Carroll's ninth cause of action alleges Federal Express made false and defamatory statements to the unemployment office in

reporting that Carroll had been terminated for cause due to the positive drug test results.

California Civil Code sections 47(b) and 47(c) set forth privileges applicable to alleged defamatory statements. Section 47 provides: "A privileged publication or broadcast is made: . . . (b) In any (1) legislative or (2) judicial proceeding, or (3) in any other proceeding authorized by law . . . ." (Emphasis added).

Section 47 also provides: "A privileged publication or broadcast is one made: . . . (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (Emphasis added).

Thus, section 47(b) provides absolute immunity for statements made during an official proceeding authorized by law, while section 47(c) provides the possibility of qualified (subject to a showing of actual malice) immunity for communications between interested parties. Here, application of absolute immunity pursuant to section 47(b) would require dismissal of Carroll's defamation cause

of action. Conversely, application of qualified immunity pursuant to section 47(c) would preclude dismissal and leave the parties free to prove whether or not the statements made to the unemployment office were defamatory and whether Federal Express acted with actual malice.

Courts addressing the nature of employer communication to a state unemployment office have reached different conclusions as to whether such communications are entitled to absolute or qualified immunity under California law. In Ghebreselassie v. Coleman Sec. Service, (9th Cir. 1987) 829 F.2d 892, 898, the court reviewed California law and held that written reports made by an employer to the unemployment office were entitled to qualified immunity from liability. The court stated, "Any communications to the unemployment office are entitled to a qualified privilege." Id.

In contrast, California state appellate courts interpreting California law appear to have provided broader immunity and have uniformly granted such communications absolute privilege. In Williams v. Taylor, (1982) 329 Cal.App.3d 745, 754, the court ruled that statements regarding the reasons for an employee's termination made by an employer to an unnamed official at the Department of

Employment Development were absolutely privileged. The court stated, "In our view, any statements made to the Department were absolutely privileged because they were made in connection with an official proceeding." Id. see Johnson v. Hydraulic Research & Mfg. Co., (1977) 70 Cal.App.3d 675, 684, fn. 7.

While there is merit in the Ghebreselassie court's determination that communications by an employer to unemployment officials should receive qualified immunity under California law, decisions by California courts indicate that such limited protection does not go far enough to protect participants in official proceedings. Rather, California authorities indicate that absolute immunity is needed to ensure full disclosure and discussion during official proceedings.

In the absence of a decision from a state's highest court, a federal court exercising diversity jurisdiction must predict how the state high court would resolve an issue. A federal court is bound to apply the holdings of intermediate state courts on issues of law unless convinced the state's highest court would rule otherwise. Dimidowich v. Bell & Howell, (9th Cir. 1986) 803 F.2d 1473, 1482. see West v. AT & T Co., (1940) 311 U.S. 223, 236-37. There is no indication

that the California Supreme Court would differ with the conclusion of the Williams court and determine that employer statements to unemployment office officials were only entitled to qualified immunity under state law. The court finds that any statements made by defendants at the unemployment hearing were made within the course of an "official proceeding authorized by law." As a matter of law, statements made in the course of such proceedings are entitled to absolute immunity. Williams v. Taylor, 129 Cal.App.3d at 754. Thus, Carroll's ninth cause of action for defamation must be dismissed.[4]

IV. CONCLUSION

In accordance with the foregoing, it is hereby ORDERED that:

Defendant's motion to dismiss is GRANTED in part and DENIED in part.

As to Plaintiff's first, third, fourth, seventh, eighth and ninth

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[4]Since the court holds that Carroll's ninth cause action must be dismissed due to absolute immunity under state law, the
t need not, and does not, reach the issue whether such a cause of action would be preempted by the exclusivity of the Californi
ker's Compensation Act.

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causes of action Defendant's motion is GRANTED and each cause of action is DISMISSED.

As to all other causes of action not listed above Defendant's motion is DENIED.

IT IS SO ORDERED.

Dated: February 24, 1994

/s/ Samuel Conti
United States District Judge

§391.71 Intrastate drivers of commercial motor vehicles transporting Class 3 combustible liquids.

(a) The provisions of §391.11(b)(1) (relating to minimum age), §391-21 (relating to application for employment), §391.23 (relating to investigations and inquiries), and §391.31 (relating to road test) do not apply to a driver who is otherwise qualified and was a regularly employed driver (as defined in §390.5 of the subchapter) as of July 1, 1975, and continues to be a regularly employed driver of that motor carrier and who drives a commercial motor vehicle that:

(1) Is transporting Class 3 combustible liquids (as defined in §173.120 of this title), and

(2) Is being operated in intrastate commerce.

(b) In addition to the exemptions provided in paragraph (a) of this section, the provisions of §391.41(b) (10) (related to minimum visual requirements), do not apply to a driver who was a regularly employed driver (as defined in §390.5 of this subchapter) as of July 1, 1975, and continues to be a regularly employed driver of that motor carrier and who drives a commercial motor vehicle that:

(1) Is a truck (as defined in §390.5 of this subchapter), and

(2) Is operated in retail delivery service, and

(3) Is transporting a Class 3 combustible liquid (as defined in §173.120 of this title), and

(4) Is operated in intrastate commerce.

[40 FR 54796, Nov. 26, 1975; 40 FR 58858, Dec. 19, 1975, as amended at 53 FR 18057, May 19, 1988; 59 FR 60324, Nov. 23, 1994; 59 FR 63924, 1 Dec. 12, 1994; 60 FR 38745, 38746, July 28, 1995]

§ 391.73 Private motor carrier of passengers (business)

The provisions of §391.21 (relating to applications for employment), §391.23 (relating to investigations and inquiries), and §391.31 (relating to road tests) do not apply to a driver who has been a regularly employed driver (as defined in §390.5 of this subchapter) of a private motor carrier of passengers (business) as of July 1, 1994, so long as the driver continues to be a regularly employed driver of that motor carrier. Such a driver is qualified to drive a commercial motor vehicle if that driver fulfills the requirements of paragraphs (b)(l) through (b)(9) of §391.11 (relating to qualifications of drivers).

[59 FR 60324, Nov. 23, 1994, as amended at 60 FR 38745, July 18, 1995]

Subpart H - Controlled Substances Testing

SOURCE: 53 FR 47151, Nov. 21, 1988, unless otherwise noted.

§391.81 Purpose and scope.

(a) The purpose of this subpart is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage.

(b) This subpart prescribes minimum Federal safety standards to detect and deter the use of controlled substances as defined in 49 CFR part 40 (marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP)).

(c) As part of reasonable cause drug testing programs established pursuant to this subpart, motor carriers may test for drugs in addition to those specified in this part . Only with approval granted by the Federal Highway Administrator under 49 CFR part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§391.83 Applicability.

(a) Except for a private motor carrier of passengers (nonbusiness), this subpart applies to motor carriers and persons who operate a commercial motor vehicle as defined in this subpart in interstate commerce and are subject to the driver qualification requirements of part 391 of this subchapter.

(b) This subpart shall not apply to any person for whom compliance with this subpart would violate the domestic laws or policies of another country.

(c) This subpart is not applicable with respect to any foreign based employee of a foreign-domiciled motor carrier.

[53 FR 47151, Nov. 21, 1988, as amended at 59 FR 8753, Feb. 23, 1994; 60 FR 56, Jan. 3, 1995]

§ 391.85 Definitions.

As used in this subpart-

Collection site means a place where individuals present themselves

for the purpose of providing body fluid or tissue samples to be analyzed for specified controlled substances. The site must possess all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and transportation or shipment of the samples to a laboratory.

Commercial motor vehicle means any self-propelled or towed motor vehicle, used on public highways in interstate, commerce to transport passengers or property when:

(a) The motor vehicle has a gross vehicle weight rating or gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(b) The motor vehicle is designed to transport more than 15 passengers, including the driver; or

(c) The motor vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act (49 U.S.C. 5101 *et. seq.*).

Controlled substances has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR part 1308).

Drug means any substance (other than alcohol) that is a controlled substance as defined in this section and 49 CFR part 40.

FHWA means the Federal Highway Administration, U.S. Department of Transportation.

Interstate commerce means trade, traffic, or transportation in the United States which is between a place in a State and a place outside of such State (including a place outside of the United States) or is between two places in a State through another State or a place outside of the United States.

Medical practitioner means a licensed, doctor of medicine (MD) or osteopathy (DO) or a doctor of dental surgery (DDS) authorized to practice by the State in which the person practices.

Medical Review Officer means a licensed doctor of medicine or osteopathy with knowledge of drug abuse disorders that is employed or used by a motor carrier to conduct drug testing in accordance with this part.

Motor carrier means a for-hire motor carrier or a private motor carrier of property. The term "motor carrier" includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and

employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of sub-chapter B, the definition of "motor carrier" includes the terms "employer" and "exempt motor carrier."

Non-suspicion-based post-accident testing means testing of a commercial motor vehicle driver after an accident, as defined in §390.5 of this subchapter:

(1) If the driver of the commercial motor vehicle receives a citation for a moving traffic violation arising from the accident, as required by §391.113 of this subpart; and

(2) Without regard to whether there is any reasonable suspicion of drug usage, reasonable cause to believe the driver has been operating the commercial motor vehicle while under the influence of drugs, or reasonable cause to believe the driver was at fault in the accident and drug usage may have been a factor.

Random selection process means that drug tests are unannounced and that every commercial motor vehicle driver of a motor carrier has an equal chance of being selected for testing.

Reasonable cause means that the motor carrier believes the actions or appearance or conduct of a commercial motor vehicle driver, on duty as defined in §395.2 of this subchapter, are indicative of the use of a controlled substance.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3555, Feb. 1, 1990; 56 FR 40809, Aug. 16, 1991; 58 FR 33777, June 21, 1993; 60 FR 38746, July 28. 1995; 61 FR 9567, Mar. 8, 1996]

§391.87 Notification of test results and record keeping.

(a) The MRO shall report to the motor carrier whether a driver's test was positive or negative and, if positive, the identity of the controlled substance for which the test was positive.

(b) A motor carrier shall notify its driver or driver-applicant of the results of a controlled substance test conducted under this subpart.

(c) A motor carrier shall notify-

(1) A driver-applicant of the results of a pre-employment controlled substance test conducted under this subpart provided the driver-applicant requests such results within 60 days of being notified of the disposition of the employment application; or

(2) A driver of the results of a periodic, random, reasonable cause, or post-accident test conducted under this subpart, provided the

results were positive. The driver must also be advised of what controlled substance was identified in any positive test.

(d) A motor carrier shall ensure that all records related to the administration and results of the drug testing program for its drivers subject to the testing requirements are maintained for a minimum period of 5 years except that individual negative test results shall be maintained for a minimum of 12 months.

(e) A medical review officer shall be the sole custodian of individuals test results. The medical review officer shall retain the reports of individual test results for a minimum of 5 years.

(f) A motor carrier shall retain in the driver's qualification file such information that will indicate only the following:

(1) The types of controlled substances testing for which the driver submitted a urine specimen.

(2) The date of such collection.

(3) The location of such collection.

(4) The identity of person or entity:

(i) Performing the collection,

(ii) Analysis of the specimens, and

(iii) Serving as the MRO.

(5) Whether the test finding was " positive" or "negative" and, if "positive," the controlled substances identified in any positive test.

(g) A motor carrier shall produce upon demand and shall permit the Federal Highway Administrator to examine all records related to the administration and results of controlled substance testing performed under this part.

(h) A motor carrier shall maintain all administrative records pertaining to its controlled substances testing program and an annual calendar year summary of the results of its controlled substances testing program performed under this subpart.

(1) The administrative records shall include agreements with collection facilities, laboratories, MROs, consortia, names and positions of company officials and their role in the motor carrier's controlled substances testing program, quarterly laboratory summaries, record keeping and testing procedures including random testing selection and notification procedures.

(2) The motor carrier's summary shall include the following information:

(I) Number of drivers subject to subpart H;

(ii) Number of drivers subject to testing under the anti-drug

rules of more than one DOT agency, identified by each agency;

(iii) Number of specimens collected by type of test (e.g., pre-employment, random, reasonable cause/suspicion, post-accident);

(iv) Number of positives verified by a MRO by type of test, type of controlled substance;

(v) Number of negatives verified by a MRO by type of test;

(vi) Number of persons denied a position as a driver following a verified controlled substances test;

(vii) Number of drivers verified positive by a MRO who were returned to duty as a driver during the reporting period;

(viii) Number of drivers with tests verified positive by a MRO for multiple controlled substances;

(ix) Number of drivers who refused to submit to a controlled substances test required under this subpart; and

(x) Number of supervisors who have received required training during the reporting period.

(3) A motor carrier shall prepare and maintain a summary of the results of its alcohol and controlled substances testing programs performed under this part during the previous calendar year, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the motor carrier or any of its drivers. The information shall be made available for inspection at the motor carrier's principal place of business within two business days of the request.

(4) If, during the month of January, a motor carrier is provided with forms by the Federal Highway Administration on which to report the motor carrier's annual calendar year summary information, the motor carrier shall complete the forms and submit them to the Federal Highway Administration by March 15 of that year. The motor carrier shall ensure that the annual summary report is accurate and received by March 15 at the location that the Federal Highway Administration specifies in its request. The report shall be in the form and manner prescribed by the Federal Highway Administration in its request. When the report is submitted to the Federal Highway Administration by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each motor carrier shall ensure the accuracy and timeliness of each report submitted by the motor carrier or a consortium.

(Approved by the Office of Management and Budget under control number 21254543)

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3555, Feb. It 1990; 58 FR 68222, Dec. 23, 1993; 59 FR 49586, Sept, 29, 1994; 60 FR 13370 ,Mar. 13,1995]

§391.89 Access to individual test results or test findings.

(a) No person may obtain the individual test results retained by a medical review officer, and no medical review officer shall release the individual test results of any employee to any person, without first obtaining written authorization from the tested employee. Nothing in this paragraph shall prohibit a medical review officer from releasing, to the employing motor carrier, the information delineated in §391.87(f) of this subpart.

(b) No person may obtain the information delineated in §391.87(f) of this part and retained by a motor carrier, and no motor carrier shall release such information about any employee or previous employee, without first obtaining written authorization from the tested employee.

[58 FR 33777, June 21, 1993]

§ 391.93 Implementation schedule

(a) All motor carriers shall have a drug testing program that conforms to this subpart and 49 CFR part 40 by the date a motor carrier begins motor carrier operations.

(b) All motor carriers shall require all collection personnel to implement the split sample collection procedures required under §40.25(f)(10) of this title by August 15, 1994.

(c) An employer may begin complying with the requirements of paragraph (b) of this section on or after March 17, 1994.

[59 FR 7514, Feb. 15,1994]

§ 391.95 Drug use prohibitions.

(a) No driver shall be on duty, as defined in §395.2 of this subchapter, if the driver uses any controlled substances, except as provided in §391.97 of this part.

(b) No driver shall be on duty, as defined in §395.2 of this subchapter, if the driver tests positive for use of controlled substances, except as provided in §391.97 of this part.

(c) A person who tests positive for the use of a controlled substance, as defined in 49 CFR part 40, is medically unqualified to

operate a commercial motor vehicle.

(d) A person who refuses to be tested under provisions of this subpart shall not be permitted to operate a commercial motor vehicle. Such refusal shall be treated as a positive test and subject the driver to the restrictions contained in paragraph (e) of this section.

§391.97 Prescribed drugs.

(a) *Affirmative defense.* Any driver who is alleged to have violated §391.95 of this subpart shall have available as an affirmative defense, to be proven by the driver through clear and convincing evidence, that his/her use of a controlled substance (except for methadone) was prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties.

(b) The MRO shall afford a tested individual the opportunity to discuss a positive test result with the MRO before reporting the positive test result to the motor carrier. If an MRO, after making and documenting all reasonable efforts is unable to contact a tested person, the MRO shall contact a designated management official of the motor carrier to arrange for the individual to contact the MRO prior to going on duty. The MRO may verify a positive test without having communicated with the driver about the results of the test if:

(1) The driver expressly declines the opportunity to discuss the results of the test, or

(2) Within 5 days after a documented contact by a designated management official of the motor carrier instructing the driver to contact the MRO, the driver has not done so.

(e) All positive tests reported to the motor carrier by the MRO in which the MRO did not discuss the results with the driver shall be so noted and be accompanied by complete documentation of the MRO's efforts to contact the driver including contacts with a motor carrier's designated management official.

(d) The rules in this subpart do not prohibit a motor carrier from requiring a driver to notify the motor carrier of therapeutic drug use.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3555, Fab. 1 1990]

§ 391.99 Reasonable cause testing requirements.

(a) A motor carrier shall require a driver to be tested, upon reasonable cause, for the use of controlled substances.

(b) A driver shall submit to testing, upon reasonable cause, for

the use of controlled substances when requested to do so by the motor carrier.

(c) The conduct must be witnessed by at least two supervisors or company officials, if feasible. If not feasible, only one supervisor or company official need witness the conduct. The witness or witnesses must have received training in the identification of actions, appearance, or conduct of a commercial motor vehicle driver which are indicative of the use of a controlled substance.

(d) The documentation of the driver's conduct shall be prepared and signed by the witnesses within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier.

[53 FR 47151, Nov. 21, 1988 as amended at 55 FR 3556, Feb. 1. 1990]

§391.101 Reasonable cause testing procedures.

(a) A motor carrier shall ensure that the driver is transported immediately to a collection site for the collection of a urine sample.

(b) A motor carrier shall ensure that the test performed under the requirements of §391.99 of this subpart conforms with 49 CFR part 40 and this subpart.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3556, Feb. 1, 1990]

§ 391.103 Pre-employment testing requirements.

(a) A motor carrier shall require a driver-applicant who the motor carrier intends to hire or use to be tested for the use of controlled substances as a pre-qualification condition.

(b) A driver-applicant shall submit to controlled substance testing as a pre-qualification condition.

(c) Prior to collection of a urine sample under §391.107 of this subpart, a driver-applicant shall be notified that the sample will be tested for the presence of controlled substances.

(d) *Exceptions.* (1) A motor carrier may use a driver who is a regularly employed driver of another motor carrier without complying with paragraph (a) of this section, if the driver meets the requirement of §391.65 of this subchapter.

(2) A motor carrier may use a driver who is not tested by the

motor carrier without complying with paragraph (a) of this section, provided the motor carrier assures itself:

(i) That the driver has participated in a drug testing program that meets the requirements of this subpart within the previous 30 days and,

(ii) While participating in that program, was either

(A) Tested for controlled substances within the past 6 months (from the date of application with the motor carrier) or

(B) Participated in the drug testing program for the previous 12 months (from the date of application with the motor carrier).

(3) A motor carrier who exercises either paragraph (d)(1) or (d)(2) of this section shall contact the controlled substances testing program in which the driver participates or participated and shall obtain the following information:

(i) Name and address of the program.

(ii) Verification that the driver participates or participated in the program.

(iii) Verification that the program conforms to 49 CFR part 40.

(iv) Verification that the driver is qualified under the rules of this part including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for controlled substances.

(vi) The results, positive or negative, of any test taken.

(4) The motor carrier shall retain the information required by this paragraph in the driver's qualification file required under §391.51 of this part.

(5) A motor carrier who uses, but does not employ, such a driver more than once a year must assure itself once every 6 months that the driver participates in a controlled substances testing program that meets the requirements of this subpart.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 35-56, Feb. 1, 1990]

§ 391.105 Biennial (periodic) testing requirements.

(a) A motor carrier shall require a driver to be tested in accordance with the procedures set forth in this subpart and part 40 of this title at least once every two years commencing with the driver's first medical examination required under §391.45 of this part after the motor carrier's implementation of a drug testing program in

accordance with this subpart.

(b) *Exception.* A motor carrier may use a driver who participates in a drug testing program of another motor carrier or controlled substance test consortium.

(c) *Exceptions.* A motor carrier may discontinue periodic testing after a driver has been tested at least once under

(1) The requirements of paragraph (a) of this section;

(2) The requirements of §391.103 of this subpart; or

(3) The requirements of § 391.109 of this subpart, and the motor carrier is testing its drivers at a 50 percent rate under its random testing program as required by §391.109 of this subpart.

[53 FR 47151, Nov. 21, 1998, as amended at 55 FR 3556, Feb. 1, 1990]

§ 391.107 Pre-employment and biennial testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A motor carrier shall ensure that the test preformed under the requirements of §391.105 of this subpart conforms with 49 CFR part 40 and this subpart.

[53 FR 47151, Nov. 21, 19889 as amended at 55 FR 3556, Feb. 1, 1990]

§ 391.109 Random testing requirements,

(a) The number of tests conducted under this section annually shall equal or exceed 50 percent (50%) of the average number of commercial motor vehicle driver positions for which testing is required to be tested under this subpart.

(b) A motor carrier shall use a random selection process to select and request a driver to be tested for the use of controlled substances.

(c) A driver shall submit to controlled substance testing when selected by a random selection process used by a motor carrier.

(d) *Exception.* A motor carrier may use the results of another's controlled substances testing program that a driver participates in to meet the requirements of this section provided that the motor carrier obtains the following information from the controlled substances testing program entity:

(1) Name and address of the program.

(2) Verification that the driver participates in the program

(3) Verification that program conforms to the 49 CFR part 40.

(4) Verification that driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(5) The date the driver was last tested for controlled substances.

(6) The results, positive or negative, of any tests taken.

[53 FR 47151, Nov. 21, 19889 as amended at 55 FR 3556, Feb. 1. 1990]

§391.111 Random testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A motor carrier shall ensure that the test performed under the requirements of §391.109 of this subpart conforms with 49 CFR part 40 and this subpart.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 35111, Feb. 1. 1990]

§ 391.113 Post-accident testing requirements

(a) A driver shall provide a urine sample to be tested for the use of controlled substances as soon as possible, but not later than 32 hours, after an accident, as defined in §390.5 of this subchapter, if the driver of the commercial motor vehicle receives a citation for a moving traffic violation arising from the accident.

(b) A driver who is seriously injured and cannot provide a specimen at the time of the accident shall provide the necessary authorization for obtaining hospital reports and other documents, that would indicate whether there were any controlled substances in his/her system.

(c) A motor carrier shall provide drivers with necessary information and procedures so that the driver will be able to meet the requirement of paragraph (a) of this section.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3556, Feb. 1, 1990; 58 FR 33777, June 21, 1993]

§391.115 Post-accident testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A driver shall ensure that a specimen is collected and forwarded to a National Institute on Drug Abuse (NIDA) certified laboratory in a manner which conforms to 49 CFR part 40.

(c) A motor carrier shall ensure that the test performed under the requirements of §391.113 of this subpart conforms with 49 CFR part 40 and this subpart.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3557, Feb. 1. 19111]

§ 391.117 Disqualification.

(a) *Disqualification for refusal.* Except for a driver who meets the conditions of §391.113(b), a driver shall be disqualified by issuance of a letter of disqualification for a period of 1 year following a refusal to give a urine sample when the driver has been involved in a fatal accident.

(b) *Disqualification for use of controlled substances.* A driver shall be disqualified by issuance of a letter of disqualification for a period of 1 year for a positive test of controlled substance use when the driver has been involved in a fatal accident.

§391.119 Employee Assistance Program (EAP).

(a) Every motor carrier shall establish an EAP program. The EAP program shall, as a minimum, include-

(1) An educational and training component for drivers which addresses controlled substances;

(2) An education and training component for supervisory personnel and company officials which addresses controlled substances; and

(3) A written statement, on file and available for inspection, at the motor carrier's principal place of business, outlining the motor carrier's EAP.

(b) [Reserved]

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3557, Feb. 1, 1990]

§ 391.121 EAP training program,

(a) Each EAP shall consist of an effective training program for the motor carrier's supervisory personnel and all drivers.

(b) The training program must include at least the following elements:

(1) The effects and consequences of controlled substance use on personal health, safety, and the work environment;

(2) The manifestations and behavioral changes that may indicate controlled substance use or abuse; and

(3) Documentation of training given to drivers and motor carrier supervisory personnel.

(c) EAP training programs for all drivers and supervisory personnel must consist of at least 60 minutes of training.

[53 FR 47151, Nov. 21, 1988, as amended at 55 FR 3557, Feb. 1, 1990]

§391.123 After-care monitoring.

After returning to work, drivers who test positive must continue in any aftercare program and be subject to follow-up testing for not longer than 60 months following return to work.

§ 391.125 Termination schedule of this subpart.

(a) All motor carriers shall retain all records generated in connection with this subpart as required by §382.401 of this subchapter.

(b) *Large employers.* Except as provided in paragraph (a) of this section, each motor carrier with fifty or more drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of part 382 of this subchapter beginning on January 1. 1995.

(c) *Small employers.* Except as provided in paragraph (a) of this section, each motor carrier with fewer than fifty drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of Part 382 of this subchapter beginning on January 1, 1996.

(d) Except as provided in paragraph (a) of this section, all motor carriers shall terminate compliance with this subpart on January 1, 1996.

[61 FR 9567, Mar. 8, 1996]

On-duty time shall include:

(1) All time at a carrier or shipper, plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier,

(2) All time inspecting equipment as required by §§392.7 and 392.8 of this chapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term *driving time* in this section;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth as defined

by the term *sleeper berth* of this section;

(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 or part 391, subpart H, of this subchapter, whichever is applicable, when directed by a motor carrier;

(8) Performing any other work in the capacity of, or in the employ or service of, a common, contract or private motor carrier; and

(9) Performing any compensated work for any nonmotor carrier entity.

Seven consecutive days means the period of 7 consecutive days beginning on any day at the time designated by the motor carrier for a 24-hour period.

Sleeper berth means a berth conforming to the requirements of §393.76 of this chapter.

§382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§382.103 Applicability.

(a) This part applies to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State, and is subject to:

(1) The commercial driver's license requirements of part 383 of this subchapter;

(2) The Licencia Federal de Conductor (Mexico) requirements; or

(3) The commercial driver's license requirements of the Canadian National Safety Code.

(b) An employer who employs himself/herself as a driver must

comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement a random alcohol and controlled substances testing program of two or more covered employees in the random testing selection pool.

(c) The exceptions contained in §390.3(g) of this subchapter do not apply to this part. The employers and drivers identified in §390.3(g) must comply with the requirements of this part, unless otherwise specifically provided in paragraph (d) of this section.

(d) *Exceptions.* This part shall not apply to employers and their drivers.

(1) Required to comply with the alcohol and/or controlled substances testing requirements of parts 653 and 654 of this title (Federal Transit Administration alcohol and controlled substances testing regulations); or

(2) Who a State must waive from the requirements of part 383 of this subchapter. These individuals include active duty military personnel members of the reserves; and members of the national guard on active duty, including personnel on full-time national guard duty, personnel on part-time national guard training and national guard military technicians (civilians who are required to wear military uniforms), and active duty U.S. Coast Guard personnel;

(3) Who a State has, at its discretion, exempted from the requirements of part 383 of this subchapter. These individuals may be:

(i) Operators of a farm vehicle which is:

(A) Controlled and operated by a former;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both to or from a farm;

(C) Not used in the operations of a common or contract motor carrier; and

(D) Used within 241 kilometers (150 miles) of the farmer's farm.

(ii) Firefighters or other persons who operate commercial motor vehicles which are necessary for the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals, and are not subject to normal traffic regulation.

§382.105 Testing procedures.

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

§ 382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and §40.3 of this title, except as provided herein-

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl and isopropyl alcohol.

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this part.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Commerce means:

(1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and

(2) Trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle-

(1) Has a gross combination weight rating of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or

(2) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 or more pounds); or

(3) Is designed to transport 16 or more passengers, including the driver; or

(4) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be

placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation test for alcohol testing means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration. For controlled substances testing means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the screen test and which uses a different technique and chemical principle from that of the screen test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol or controlled substances testing as required by this part, or other DOT alcohol or controlled substances testing rules, and that acts on behalf of the employers.

Controlled substances mean those substances identified in §40.21(a) of this title.

Disabling damage means damage which precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusions.* Damage to motor vehicles that could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.*

(i) Damage which can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlight or taillight damage.

(iv) Damage to turn signals, horn, or windshield wipers which make them inoperative.

DOT Agency means an agency (or "operating administration") of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (14 CFR parts 61 t 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle. This includes, but is not limited to: Full time, regularly employed drivers; casual, intermittent or occasional drivers, leased

drivers and independent, owner operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer.

Employer means any person including the United States, a State, District of Columbia, tribal government or a political subdivision of a State who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term employer includes an employer's agents, officers and representatives.

Licensed medical practitioner means a person who is licensed, certified, and/or registered in accordance with applicable Federal, State, local, or foreign laws and regulations, to prescribe controlled substances and other drugs.

Performing (a safety-sensitive function) means a driver is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform or immediately available to perform any safety-sensitive functions.

Positive rate means the number of positive results for random controlled substances tests conducted under this part plus the number of refusals of random controlled substances tests required by this part, divided by the total of random controlled substances tests conducted under this part plus the number of refusals of random tests required by this part.

Refuse to submit (to an alcohol or *controlled substances test)* means that a driver:

(1) Fails to provide adequate breath for alcohol testing as required by part 40 of this title, without a valid medical explanation, after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part,

(2) Fails to provide an adequate urine sample for controlled substances testing as required by part 40 of this title, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement for urine testing in accordance with the provisions of this part, or

(3) Engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. Safety-sensitive functions shall include:

(1) All time at an employer or plant, terminal, facility, or other property, or on any public property waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by §§392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of §393.76 of this subchapter);

(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and (6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

Screening test (also known as initial test) In alcohol testing, it means an analytical procedure to determine whether a driver may have a prohibited concentration of alcohol in his or her system. In controlled substance testing, it means an immunoassay screen to eliminate "negative" urine specimens from further consideration.

Violation rate means the number of drivers (as reported under §382.305 of this part) found during random tests given under this part to have an alcohol concentration of 0.04 or greater, plus the number of drivers who refuse a random test required by this part, divided by the total reported number of drivers in the industry given random alcohol tests under this part plus the total reported number of drivers in the industry who refuse a random test required by this part.

[61 FR 9553, Mar. 8, 19%t as amended at 61 FR 37224, July 17, 1996]

§ 382.109 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this part is not possible; or

(2) Compliance with the State or local requirement is an obstacle

to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees, employers, or the general public.

§382-111 Other requirements imposed by employers.

Except as expressly provided in this part, nothing in this part shall be construed to affect the authority of employers, or the rights of drivers, with respect to the use of alcohol, or the use of controlled substances, including authority and rights with respect to testing and rehabilitation.

§ 382-113 Requirement for notice.

Before performing an alcohol or controlled substances test under this part, each employer shall notify a driver that the alcohol or controlled substances test is required by this part. No employer shall falsely represent that a test is administered under this part.

§382.115 Starting date for testing programs

(a) Large domestic employers. Each employer with fifty or more drivers on March 17, 1994, will implement the requirements of this part beginning on January 1, 1995.

(b) Small domestic employers. Each employer with less than fifty drivers on March 17, 1994, will implement the requirements of this part beginning on January 1, 1996.

(c) All domestic employers. Each domestic employer that begins commercial motor vehicle operations after March 17, 1994, but before January 1, 1996, will implement the requirements of this part beginning on January 1996. However, such an employer may be subject to the requirements of part 391, subpart H on the date they begin operations, if operating commercial, motor vehicles in interstate commerce. A domestic employer that begins commercial motor vehicle operations on or after January 1, 1996, will implement the requirements of this part on the date the employer begins such operations.

(d) Large foreign employers. Each foreign-domiciled employer with fifty or more drivers assigned to operate commercial motor vehicles in North America on December 17, 1995, must implement the requirements of this part beginning on July 1, 1996.

(e) Small foreign employers. Each foreign-domiciled employer with less than fifty drivers assigned to operate commercial motor vehicles in North America on December 17, 1995, must implement the requirements of this part beginning on July 1, 1997.

(f) All foreign employers. Each foreign domiciled employer that begins commercial motor vehicle operations in the United States after December 17, 1995, but before July 1, 1997, must implement the requirements of this part beginning on July 1, 1997. A foreign employer that begins commercial motor vehicle operations in the United States on or after July 1, 1997, must implement the requirements of this part on the date the foreign employer begins such operations.

Subpart B-Prohibitions

§382.201 Alcohol concentration.

No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. No employer having actual knowledge that a driver has an alcohol concentration of 0.04 or greater shall permit the driver to perform or continue to perform safety-sensitive functions.

§382.205 On-duty use.

No driver shall use alcohol while performing safety-sensitive functions. No employer having actual knowledge that a driver is using alcohol while performing safety-sensitive functions shall permit the driver to perform or continue to perform safety-sensitive functions.

§382.207 Pre-duty use.

No driver shall perform safety-sensitive functions within four hours after using alcohol. No employer having actual knowledge that a driver has used alcohol within four hours shall permit a driver to perform or continue to perform safety-sensitive functions.

§ 382.209 Use following an accident.

No driver required to take a post-accident alcohol test under §382.303 of this part shall use alcohol for eight hours following the accident, or until he/she undergoes a post-accident alcohol test, whichever occurs first.

§382.211 Refusal to submit to a required alcohol or controlled substances test,

No driver shall refuse to submit to a post-accident alcohol or controlled substances test required under §382.303, a random alcohol or controlled substances test required under §382.306, a reasonable suspicion alcohol or controlled substances test required under §3.82.307, or a follow-up alcohol or controlled substances test required under §3.82.311. No employer shall permit a driver who refuses to submit to such tests to perform or continue to perform safety-sensitive functions.

§ 382.213 Controlled substances use.

(a) No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance, except when the use is pursuant to the instructions of a licensed medical practitioner, as defined in §382.107 of this part, who has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.

(b) No employer having actual knowledge that a driver has used a controlled substance shall permit the driver to perform or continue to perform a safety-sensitive function.

(c) An employer may require a driver to inform the employer of any therapeutic drug use.

§382.215 Controlled substances testing

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances. No employer having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety sensitive functions.

Subpart C-Tests Required

§382.301 Pre-employment testing.

(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances as a condition prior to being used, unless the employer uses the exception in paragraphs (c) and (d) of this section. No employer shall allow a driver, who the employer intends to hire or use, to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentra-

tion less than 0.04, and has received a controlled substances test result from the MRO indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provision of §382.505 shall apply.

(b) *Exception for pre-employment alcohol testing.* An employer is not required to administer an alcohol test required by paragraph (a) of this section if:

(1) The driver has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and

(2) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the alcohol misuse rule of another DOT agency within the previous six months.

(c) *Exception for preemployment controlled substances testing.* An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:

(1) The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous 30 days; and

(2) While participating in that program, either

(i) Was tested for controlled substances within the past 6 months (from the date of application with the employer) or

(ii) Participated in the random controlled substances testing program for the previous 12 months (from the date of application with the employer); and

(3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.

(d)(1) An employer who exercises the exception in either paragraph (b) or (c) of this section shall contact the alcohol and/or controlled substances testing program(s) in which the driver participates or participated and shall obtain and retain from the testing program(s) the following information:

(i) Name(s) and address(es) of the program(s).

(ii) Verification that the driver participates or participated in the program(s).

(iii) Verification that the program(s) conforms to part 40 of this title.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for alcohol or controlled substances.

(vi) The results of any tests taken within the previous six months and any other violations of subpart B of this part.

(2) An employer who uses, but does not employ, a driver more than once a year to operate commercial motor vehicles must obtain the information in paragraph (d)(1) of this section at least once every six months. The records prepared under this paragraph shall be maintained in accordance with §382.401. If the employer cannot verify that the driver is participating in a controlled substances testing program in accordance with this part and part 40, the employer shall conduct a pre-employment alcohol and/or controlled substances test.

(e) Nothwithstanding any other provisions of this subpart, all provisions and requirements in this section pertaining to pre-employment testing for alcohol are vacated as of May 1, 1995.

§382.303 Post-accident testing,

(a) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol and controlled substances each surviving driver:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(I) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(3) This table notes when a post-accident test is required to be conducted by paragraphs (a)(1) and (a)(2) of this section.

TABLE FOR §382.303(a)(3)

Type of accident involved	Citation is issued to the CMV driver	Test must be performed by employer
- Human fatality	YES	YES
	NO	NO
- Bodily injury with immediate medical treatment away from the scene	YES	YES
	NO	NO
- Disabling damage to any motor vehicle requiring tow away	YES	YES
	NO	NO

(b)(1) *Alcohol tests.* If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FHWA upon request of the Associate Administrator.

(2) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FHWA each record of a test required by this section that is not completed within eight hours. The employer's records of tests that are not completed within eight hours shall be submitted to the FHWA by March 15, 1996; March 15, 1997, and March 15, 1998, for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/ post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Reason(s) test could not be completed within eight hours;

(iv) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred; and

(3) Records of alcohol tests that could not be completed in eight hours shall be submitted to the FHWA at the following address: Attn:

Alcohol Testing Program, Office of Motor Carrier Research and Standards (HCS-1), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(4) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FHWA upon request of the Associate Administrator.

(c) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(d) An employer shall provide drivers with necessary post-accident information, procedures and instructions prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(e)(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.

(f) *Exception.* This section does not apply to:

(1) An occurrence involving only boarding or alighting from a stationary motor vehicle, or

(2) An occurrence involving only the loading or unloading of cargo; or

(3) An occurrence in the course of the operation of a passenger car or a multipurpose passenger vehicle (as defined in §571.3 of this title)

by an employer unless the motor vehicle is transporting passengers for hire or hazardous materials of a type and quantity that require the motor vehicle to be marked or placarded in accordance with §117.823 of this title.

§382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

(c) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by §382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the FHWA Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FHWA Administrator may lower this rate to 10 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting requirements of §382.403 for

two consecutive calendar years indicate that th violation rate is less than 1.0 percen but equal to or greater than 0.5 per cent.

(e)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all driver positions.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to .50 per cent for all driver positions.

(f) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by §382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality an completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the FHWA Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication.

(g) When the minimum annual percentage rate for random controlled testing is 50 percent, the FHWA Administrator may lower this rate to 25 percent of all driver positions if the FHWA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent. However, after the initial two years of random testing by large employers and the initial first year of testing by small employers under this section, the FHWA Administrator may lower the rate the following calendar year, if the combined positive testing rate is less than 1.0 percent, and if it would be in the interest of safety.

(h) When the minimum annual percentage rate for random

controlled substances testing is 25 percent, and the data received under the reporting requirements of §382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as , random number table or a computer based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(j) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol and controlled substances testing determined by the FHWA Administrator. If the employer conducts random testing for alcohol and/or controlled substances through a consortium, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled sub stances random testing rule.

(k) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced and that the dates for administering random alcohol and con trolled substances tests are spread reasonably throughout the calendar year

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the drive ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled

substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(o) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may-

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject

§ 382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with §382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during,

just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(e)(1) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (a) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (a) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) For the years stated in this paragraph, employers who submit MIS reports shall submit to the FHWA each record of a test required by this section that is not completed within 8 hours. The employer's records of tests that could not be completed within 8 hours shall be submitted to the FHWA by March 15, 1996; March 15, 1997; and March 15, 1998; for calendar years 1995, 1996, and 1997, respectively. Employers shall append these records to their MIS submissions. Each record shall include the following information:

(i) Type of test (reasonable suspicion/post-accident);

(ii) Triggering event (including date, time, and location);

(iii) Reason(s) test could not be completed within 8 hours; and

(iv) If blood alcohol testing could have been completed within eight hours, the name, address, and telephone number of the testing site where blood testing could have occurred.

(3) Records of tests that could not be completed in eight hours shall be submitted to the FHWA at the following address: Attn.: Alcohol Testing program, Office of Motor Carrier Research and Standards (HCS-1), Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

(4) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(5) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§382.309 Return-to-duty testing.

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§382.311 Follow-up testing.

(a) Following a determination under §382.605(b) that a driver is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/

Subpart E-Consequences for Drivers Engaging In Substance Use-Related Conduct

§382.501 Removal from safety-sensitive function.

(a) Except as provided in subpart F of this part, no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in conduct prohibited by subart B of this part or an alcohol or controlled substances rule of another DOT agency.

(b) No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section.

(c) For purposes of this subpart, commercial motor vehicle means a commercial motor vehicle in commerce as defined in §382.107, and a commercial motor vehicle in interstate commerce as defined in Part 390 of this subchapter.

§ 382.503 Required evaluation and testing,

No driver who has engaged in conduct prohibited by subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of §382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

§ 382.505 Other alcohol-related conduct

(a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver's next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action other wise consistent with law.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part

shall be subject to the penalty provisions of 49 U.S.C. section 521(b).

§40.1 Applicability.

This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employee including self-employed individuals, required to conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to, consortia). Employers are responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements of this part.

§ 40.3 Definitions.

The following definitions apply this part:

Air blank. A reading by an EBT of ambient air containing no alcohol. (In EBTs using gas chromatography technology, a reading of the device's internal standard.)

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohol including methyl or isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.

Alcohol use. The consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

Aliquot. A portion of a specimen used for testing.

Blind sample or blind performance test specimen. A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

Breath Alcohol Technician (BAT). An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.

Canceled or invalid test. In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test. In alcohol testing, a test that is deemed to be invalid under

§40.79. It is neither a positive nor a negative test.

Chain of custody. Procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. With respect to drug testing, these procedures shall require that an appropriate drug testing custody form (see §40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or sample aliquots within the laboratory.

Collection container. A container into which the employee urinates to provide the urine sample used for a drug test.

Collection site. A place designated by the employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

Collection site person. A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

Confirmation (or confirmatory) test. In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

DHHS. The Department of Health and Human Service or any designee of the Secretary, Department of Health and Human Services.

DOT agency. An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

Employee. An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part "employee" includes an applicant for employment. "Employee" and "individual" or "individual to be tested" have the same meaning for purposes of this part.

Employer. An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, employer includes an industry consortium or joint enterprise comprised of two or more employing entities.

EBT (or evidential breath testing device). An EDT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL), and identified on the CPL as conforming with the model specifications available from the National Highway Traffic Safety Administration, Office of Alcohol and State Programs.

Medical Review Officer (MRO). A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with his or her medical history and any other relevant biomedical information.

Screening test (or initial test). In drug testing, an immunoassay screen to eliminate "negative" urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

Secretary. The Secretary of Transportation or the Secretary's designee.

Shipping container. A container capable of being secured with a tamper-evident seal that is used for transfer of one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

Specimen bottle. The bottle that, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

Substance abuse professional. A licensed physician (medical Doctor or Doctor of Osteopathy); or a licensed or certified psychologist, social worker, or employee assistance professional; or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission or by the international Certification Reciprocity Consortium alcohol & Other Drug Abuse). All must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and controlled substances-related disorders.

[59 FR 7354, Feb. 15, 1994, as amended at 59 FR 43000, Aug. 19, 1994; 61 FR 37224, July 17, 1996]

§§ 40.5-40.19 (Reserved]

Subpart B-Drug Testing

§40.21 The drugs.

(a) DOT agency drug testing programs require that employers test for marijuana, cocaine, opiates, amphetainines and phencyclidine.

(b) An employer may include in its testing protocols other controlled substances or alcohol only pursuant to a DOT agency approval, if testing for those substances is authorized under agency regulations and if the DHHS has established an approved testing protocol and positive threshold for each such substance.

(c) Urine specimens collected under DOT agency regulations requiring compliance with this part may only be used to test for controlled substances designated or approved for testing as described in this section and shall not be used to conduct any other analysis or test unless otherwise specifically authorized by DOT agency regulations

(d) This section does not prohibit procedures reasonably incident to analysis of the specimen for controlled stances (e.g., determination of pH tests for specific gravity, creatinine concentration or presence of adulterants).

§40.23 Preparation for testing.

The employer and certified laboratory shall develop and maintain a clear, and well documented procedure for collection, shipment, and accessioning for urine specimens under this part. Such a procedure shall include, at a minimum, the following:

(a)(1) Except as provided in paragraph (a)(2) of this Section, use of the drug testing form prescribed under this part.

(i) This form is found in appendix A of this part.

(ii) Employers and other participants in the DOT drug testing program may not modify or revise this form, except that the drug testing custody and control form may include such additional information as may be required for billing or other legitimate purpose necessary to the collection, provide that personal identifying information on the donor (other than the social security number or other employee number) may not be provided to the laboratory.

(iii) Donor medical information may appear only on the copy provided the donor.

(2) Notwithstanding the requirement of paragraph (a)(1)(ii) of this section, employers and other participants may use existing forms that were in use in the DOT drug testing program prior to February 16, 1995, until June 1, 1995.

(b)(1) Use of a clean, single-use specimen bottle that is securely wrapped until filled with the specimen. A clean single-use collection container, (e.g. disposable cup or sterile urinal) that is securely wrapped until used may also be employed. *If urination is directly into the specimen bottle*, the specimen bottle shall be provided to the employee still sealed in its wrapper or shall be unwrapped in the employee's presence immediately prior to its being provided. *If a separate collection container is used for urination*, the collection container shall be provided to the employee still sealed in its wrapper or shall be unwrapped in the employee's presence immediately prior to its being provided; and the collection site person shall unwrap the specimen bottle in the presence of the employee at the time the urine specimen is presented.

(2) Use of a tamperproof sealing system, designed in a manner such to ensure against undetected opening. The specimen bottle shall be identified with a unique identifying number identical to that appearing on the urine custody and control form, and space shall be provided to initial the bottle affirming its identity. For purposes of clarity, this part assumes use of a system made up of one or more preprinted labels and seals (or a unitary label/seal), but use of other, equally effective technologies is authorized.

(c) Use of a shipping container in which the specimen and associated paperwork may be transferred and which can be sealed and initialed to prevent undetected tampering. If the split specimen option is exercised, the split specimen and associated paperwork shall be sealed in a shipping (or storage) container and initialed to prevent undetected tampering.

(d) Written procedures, instructions and training shall be provided as follows:

(1) Employer collection procedures and training shall clearly emphasize that the collection site person is responsible for maintaining the integrity of the specimen collection and transfer process, carefully ensuring the modesty and privacy of the donor, and is to avoid any conduct or remarks that might be construed as accusatorial or otherwise

offensive or inappropriate.

(2) A collection site person shall have successfully completed training to carry out this function or shall be a licensed medical professional or technician who is provided instructions for collection under this part and certifies completion as required in this part

(i) A non-medical collection site person shall receive training in compliance with this part and shall demonstrate proficiency in the application of this part prior to serving as a collection site person. A medical professional, technologist or technician licensed or otherwise approved to practice in the jurisdiction in which the collection takes place is not required to receive such training if that person is provided instructions described in this part and performs collections in accordance with those instructions.

(ii) Collection site persons shall be provided with detailed, clear instructions on the collection of specimens in compliance with this part. Employer representatives and donors subject to testing shall also be provided standard written instructions setting forth their responsibilities.

(3) Unless it is impracticable for any other individual to perform this function a direct supervisor of an employee shall not serve as the collection site person for a test of the employee. If the rules of a DOT agency are more stringent than this provision regarding the use of supervisors as collection site personnel, the DOT agency rules shall prevail with respect to testing to which they apply.

(4) In any case where a collection monitored by non-medical personnel is directly observed, the collection site person shall be of the same gender as the donor. A collection is monitored for this purpose if the enclosure provides less than complete privacy for the donor (e.g., if a restroom stall is used and the collection site person remains in the restroom, or if the collection site person is expected to listen for use of unsecured sources of water

[54 FR 49866, Dec. 1, 1989, as amended at 60 FR 19536, Apr. 19, 1995]

§ 40.25 Specimen collection procedures.

(a) *Designation of collection site.* (1) Each employer drug testing program shall have one or more designated collection sites which have all necessary personnel, materials, equipment, facilities and supervision to provide for the collection, security, temporary storage, and shipping or transportation of urine specimens to a certified drug testing laboratory. An independent medical facility may also be utilized as a

collection site provided the other applicable requirements of this part are met.

(2) A designated collection site may be any suitable location where a specimen can be collected under conditions set forth in this part, including a properly equipped mobile facility. A designated collection site shall be a location having an enclosure within which private urination can occur, a toilet for completion of urination (unless a single use collector is used with sufficient capacity to contain the void), and a suitable clean surface for writing. The site must also have a source of water for washing hands, which, if practicable, should be external to the enclosure where urination occurs.

(b) *Security.* The purpose of this paragraph is to prevent unauthorized access which could compromise the integrity of the collection process or the specimen.

(1) Procedures shall provide for the designated collection site to be secure. If a collection site facility is dedicated solely to urine collection, it shall be secure at all times. If a facility cannot be dedicated solely to drug testing, the portion of the facility used for testing shall be secured during drug testing.

(2) A facility normally used for other purposes, such as a public rest room or hospital examining room, may be secured by visual inspection to ensure other persons are not present and undetected access (e.g., through a rear door not in the view of the collection site person) is not possible. Security during collection may be maintained by effective restriction of access to collection materials and specimens. In the case of a public rest room, the facility must be posted against access during the entire collection procedure to avoid embarrassment to the employee or distraction of the collection site person.

(3) If it is impractical to maintain continuous physical security of a collection site from the time the specimen is presented until the sealed mailer is transferred for shipment, the following minimum procedures shall apply. The specimen shall remain under the direct control of the collection site person from delivery to its being sealed in the mailer The mailer shall be immediately mailed, maintained in secure storage, or remain until mailed under the personal control of the collection site person.

(c) *Chain of custody.* The chain of custody block of the drug testing custody and control form shall be properly executed by authorized collection site personnel upon receipt of specimens. Handling and transportation of urine specimens from one authorized

individual or place to another shall always be accomplished through chain of custody procedures. Since specimens and documentation are sealed in shipping containers that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such persons document the chain of custody for the shipping container during transit. Nor is there a requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the collection site. Every effort shall be made to minimize the number of persons handling specimens.

(d) *Access to authorized personnel only.* No unauthorized personnel shall be permitted in any part of the designated collection site where urine specimens are collected or stored. Only the collection site person may handle specimens prior to their securement in the mailing container or monitor or observe specimen collection (under the conditions specified in this part). In order to promote security of specimens, avoid distraction of the collection site person and ensure against any confusion in the identification of specimens, the collection site person shall have only one donor under his or her supervision at any time. For this purpose, a collection procedure is complete when the urine bottle has been sealed and initialed, the drug testing custody and control form has been executed, and the employee has departed the site (or, in the case of an employee who was unable to provide a complete specimen, has entered a waiting area).

(e) *Privacy.* (1) Procedures for collecting urine specimens shall allow individual privacy unless there is a reason to believe that a particular individual may alter or substitute the specimen to be provided, as further described in this paragraph.

(2) For purposes of this part, the following circumstances are the exclusive grounds constituting a reason to believe that the individual may alter or substitute the specimen:

(i) The employee has presented a urine specimen that falls outside

the normal temperature range (32□-38□ C/ 90□-100□ F), and

(A) The employee declines to provide a measurement of body temperature (taken by a means other than use of a rectal thermometer), as provided in paragraph (f)(14) of the part; or

(B) Body temperature varies by more than 1□ C/1.8□ F from the temperature of the specimen;

(ii) The last urine specimen provided by the employee (i.e., on a previous occasion) was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below.2g/L;

(iii) The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc.); or

(iv) The employee has previously been determined to have used controlled substance without medical authorization and the particular test being conducted under a DOT regulation providing for following upon or after return to service.

(3) A higher-level supervisor of the collection site person, or a designated employer representative, shall review and concur in advance with any decision by a collection site person to obtain a specimen under the direct observation of a same gender collection site person based upon the circumstances described in subparagraph (2) of this paragraph.

(f) *Integrity and identity of specimen.* Employers shall take precautions to ensure that a urine specimen is not adulterated or diluted during the collection procedure and that information on the urine bottle and on the urine custody and control form can identify the individual from whom the specimen was collected. The following minimum precautions shall be taken to ensure that unadulterated specimens are obtained and correctly identified:

(1) To deter the dilution of specimens at the collection site, toilet bluing agents shall be placed in toilet tanks wherever possible, so the reservoir of water in the toilet bowl always remains blue. Where practicable, there shall be no other source of water (e.g., shower or sink) in the enclosure where urination occurs. If there is another source of water in the enclosure it shall be effectively secured or monitored to ensure it is not used as a source for diluting the specimen.

(2) When an individual arrives at the collection site, the collection site person shall ensure that the individual is positively identified as the employee selected for testing (e.g., through presentation of photo identification or identification by the employer's representative). If the

individual's identity cannot be established, the collection site person shall not proceed with the collection. If the employee requests, the collection site person shall show his/her identification to the employee.

(3) If the individual fails to arrive at the assigned time, the collection site person shall contact the appropriate authority to obtain guidance on the action to be taken.

(4) The collection site person shall ask the individual to remove any unnecessary outer garments such as a coat or jacket that might conceal items or substances that could be used to tamper with or adulterate the individual's urine specimen. The collection site person shall ensure that all personal belongings such as a purse or briefcase remain with the outer garments. The individual may retain his or her wallet. If the employee requests it, the collection site personnel shall provide the employee a receipt for any personal belongings.

(5) The individual shall be instructed to wash and dry his or her hands prior to urination.

(6) After washing hands, the individual shall remain in the presence of the collection site person and shall not have access to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen.

(7) The individual may provide his/ her specimen in the privacy of a stall or otherwise partitioned area that allows for individual privacy. The collection site person shall provide the individual with a specimen bottle or collection container, if applicable, for this purpose.

(8) The collection site person shall note any unusual behavior or appearance on the urine custody and control form.

(9) In the exceptional event that an employer-designated collection site is not accessible and there is an immediate requirement for specimen collection (e.g., circumstances require a post-accident test), a public restroom may be used according to the following procedures: A collection site person of the same gender as the individual shall accompany the individual into the public rest room which shall be made secure during the collection procedure. If possible, a toilet bluing agent shall be placed in the bowl and any accessible toilet tank. The collection site person shall remain in the rest room, but outside the stall, until the specimen is collected. If no bluing agent is available to deter specimen dilution, the collection site person shall instruct the individual not to flush the toilet until the specimen is delivered to the collection site person. After the collection site person has possession of the specimen, the individual will be instructed to flush the toilet and to participate with

the collection site person in completing the chain of custody procedures.

(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(i)(A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/ or Coast Guard may use the "split sample" method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, or Federal Aviation Administration shall use the "split sample" method of collection for those employees.

(ii) Employers using the split sample method of collection shall follow the procedures in this paragraph (f)(10)(ii)

(A) The donor shall urinate into a collection container or a specimen bottle capable of holding at least 60 ml.

(B)*(1)* If a collection container is used, the collection site person, in the presence of the donor, pours the urine into two specimen bottles. Thirty (30) ml shall be poured into one specimen bottle, to be used as the primary specimen. At least 15 ml shall be poured into the other bottle, to be used as the split specimen.

(2) If a single specimen bottle is used as a collection container, the collection site person, in the presence of the donor, shall pour 15 ml of urine from the specimen bottle into a second specimen bottle (to be used as the split specimen) and retain the remainder (at least 30 ml) in the collection bottle (to be used as the primary specimen).

(C) Nothing in this section precludes the use of a collection method or system that does not involve the physical pouring of urine from one container or bottle to another by the collection site person, provided that the method or system results in the subdivision of the specimen into a primary (30 ml) and a split (at least 15 ml) specimen that can be transmitted to the laboratory and tested in accordance with the requirements of this Subpart.

(D) Both bottles shall be shipped in a single shipping container, together with copies 1,2, and the split specimen copy of the chain of custody form, to the laboratory.

(E) If the test result of the primary specimen is positive, the employee may request that the MRO direct that the split specimen be

tested in a different DHHS-certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen. The MRO shall honor such a request if it is made within 72 hours of the employee having been notified of a verified positive test result.

(F) When the MRO informs the laboratory in writing that the employee has requested a test of the split specimen, the laboratory shall forward, to a different DHHS-approved laboratory, the split specimen bottle, with seal intact, a copy of the MRO request, and the split specimen copy of the chain of custody form with appropriate chain of custody entries.

(G) The result of the test of the split specimen is transmitted by the second laboratory to the MRO.

(H) Action required by DOT agency regulations as the result of a positive drug test (e.g., removal from performing a safety-sensitive function) is not stayed pending the result of the test of the split specimen.

(I) If the result of the test of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test, and report the cancellation and the reasons for it to the DOT, the employer, and the employee.

(iii) Employers using the single sample collection method shall follow the procedures in paragraph:

(A) The collector may choose to direct the employee to urinate either directly into a specimen bottle or into a separate collection container.

(B) If a separate collection container is used, the collection site person shall pour at least 30 ml of the urine from the collection container into the specimen bottle in the presence of the employee.

(iv)(A)(1) In either collection methodology, upon receiving the specimen from the individual, the collection site person shall determine if the specimen has at least 30 milliliters of urine for a single specimen collection or 45 milliliters of urine for a split specimen collection.

(2) If the individual has not provided the required quantity of urine, the specimen shall be discarded. The collection site person shall direct the individual to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a new urine specimen, whichever occurs first. If the employee refuses to drink fluids as directed or to provide a new urine specimen, the collection site person shall terminate the collection and

notify the employer that the employee has refused to submit to testing.

(3) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, the collection site person shall discontinue the collection and notify the employer.

(B) The employer shall direct any employee who does not provide a sufficient urine specimen (see paragraph (f)(10)(iv)(A)(3) of this section) to obtain, as soon as possible after the attempted provision of urine, an evaluation from a licensed physician who is acceptable to the employer concerning the employee's ability to provide an adequate amount of urine.

(1) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of urine, the employee's failure to provide an adequate amount of urine shall not be deemed a refusal to take a test. For purposes of this paragraph, a medical condition includes an ascertainable physiological condition (e.g., a urinary system dysfunction) or a documented pre-existing psychological disorder, but does not include unsupported assertions of "situational anxiety" or dehydration. The physician shall provide to the MRO a brief written statement setting forth his or her conclusion and the basis for it, which shall not include detailed information on the medical condition of the employee. Upon receipt of this statement, the MRO shall report his or her conclusions to the employer in writing.

(2) If the physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (f)(10)(iv)(B)*(1)* of this section, the employee's failure to provide an adequate amount of urine shall be regarded as a refusal to take a test. The physician shall provide to the MRO a brief written statement setting forth his or her conclusion and the basis for it, which shall not include detailed information on the medical condition of the employee. Upon receipt of this statement, the MRO shall report his or her conclusions to the employer in writing.

(11) After the specimen has been provided and submitted to the collection site person, the individual shall be allowed to wash his or her hands.

(12) Immediately after the specimen is collected, the collection site person shall measure the temperature of the specimen. The temperature measuring device used must accurately reflect the temperature of the

specimen and not contaminate the specimen. The time from urination to temperature measure is critical and in no case shall exceed 4 minutes.

(13) A specimen temperature outside the range of 32□-38□C/90□- 100□ F constitutes a reason to believe that the individual has altered or substituted the specimen (see paragraph (e)(2(i) of this section). In such cases, the individual supplying the specimen may volunteer to have his or her oral temperature taken to provide evidence to counter the reason to believe the individual may have altered or substituted the specimen.

(14) Immediately after the specimen is collected, the collection site person shall also inspect the specimen to determine its color and look for any signs of contaminants. Any unusual findings shall be noted on the urine custody and control form.

(15) All specimens suspected of being adulterated shall be forwarded to the laboratory for testing.

(16) Whenever there is reason. to believe that a particular individual has altered or substituted the specimen as described in paragraph (e)(2) (i) or (iii) of this section, a second specimen shall be obtained as soon as possible and the direct observation of a same gender collection site person.

(17) Both the individual being tested and the collection site person shall keep the specimen in view at all times prior to its being sealed and labeled. As provided below, the specimen shall be sealed (by placement of a tamperproof seal over the bottle cap and down the sides of the bottle) and labeled in the presence of the employee. If the specimen is transferred to a second bottle the collection site person shall request the individual to observe the transfer of the specimen and the placement the tamperproof seal over the bottle cap and down the sides of the bottle.

(18) The collection site person and the individual being tested shall be present at the same time during procedures outlines in paragraphs (f)(19)-(f)(22) of this section.

(19) The collection site person shall place securely on the bottle an identification label which contains the date, the individual's specimen number, and any other identifying information provided or required by the employer. If separate from the label, the tamperproof seal shall also be applied.

(20) The individual shall initial the identification label on the specimen bottle for the purpose of certifying that it is the specimen collected from him or her.

(21) The collection site person shall enter on the drug testing

custody an control form all information identifying the specimen. The collection site person, shall sign the drug testing custody and control form certifying that the collection was accomplished according to the applicable Federal requirements.

(22)(i) The individual shall be asked to read and sign a statement on the drug testing and custody and control for certifying that the specimen identified as having been collected from him or her is in fact the specimen he or she provided.

(ii) When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others.

(23) The collection site person shall complete the chain of custody portion of the drug testing custody and control form to indicate receipt of the specimen from the employee and shall certify proper completion of the collection.

(24) The urine specimen and chain of custody form are now ready for shipment. If the specimen is not immediately prepared for shipment, the collection site person shall ensure that it is appropriately safeguarded during temporary storage.

(25)(i) While any part of the above chain of custody procedures is being performed, it is essential that the urine specimen and custody documents be under the control of the involved collection site person. If the involved collection site person leaves his or he work station momentarily, the collection site person shall take the specimen and drug testing custody and control form with him or her or shall secure them. After the collection site person returns to the work station, the custody process will continue. If the collection site person is leaving for an extended period of time, he or she shall package the specimen for mailing before leaving the site.

(ii) The collection site person shall not leave the collection site in the interval between presentation of the specimen by the employee and securement of the sample with an identifying label bearing the employee's specimen identification number (shown on the urine custody and control form) and seal initialed by the employee. If it becomes

necessary for the collection site person to leave the site during this interval, the collection shall be nullified and (at the election of the employer) a new collection begun.

(g) *Collection control.* To the maximum extent possible, collection site personnel shall keep the individual's specimen bottle within sight both before and after the individual has urinated. After the specimen is collected it shall be properly sealed and labeled

(h) *Transportation to laboratory.* Collection site personnel shall arrange to ship the collected specimen to the drug testing laboratory. The specimens shall be placed in shipping containers designed to minimize the possibility of damage during shipment (e.g., specimen boxes and/or padded mailers); and those containers shall be securely sealed to eliminate the possibility of undetected tampering with the specimen and/or the form. On the tape sealing the shipping container, the collection site person shall sign and enter the date specimens were sealed in the shipping container for shipment. The collection site person shall ensure that the chain of custody documentation is enclosed in each container sealed for shipment to the drug testing laboratory. Since specimens and documents are sealed in shipping container that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the shipping container during transit. Nor is there a requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the collection site.

(i) *Failure to cooperate.* If the employee refuses to cooperate with the collection process, the collection site person shall info the employer representative and shall document the non-cooperation on the drug testing and control form.

(j) *Employee requiring medical attention.* If the sample is being collected from an employee in need of medical attention (e.g., as part of a post-accident test given in an emergency medical facility), necessary

medical attention shall not be delayed in order to collect the specimen.

(k) *Use of chain of custody form.* A chain of custody form (and a laboratory internal chain of custody document, where applicable), shall be used for maintaining control and accountability of each specimen from the point of collection to final disposition of the specimen. The date and purpose shall be documented on the form each time a specimen is handled or transferred and every individual in the chain of custody shall be identified. Since specimens and documentation are sealed in shipping containers that would indicate any tampering during transit to the laboratory and couriers, express carriers, and postal service personnel do not have access to the chain of custody forms, there is no requirement that such personnel document chain of custody for the shipping container during transit. Nor is there a requirement that there be a chain of custody entry when a specimen which is sealed in such a shipping container is put into or taken out of secure storage at the collection site prior to pickup by such personnel. This means that the chain of custody is not broken, and a test shall not be canceled, because couriers, express carriers, postal service personnel, or similar persons involved solely with the transportation of a specimen to a laboratory, have not documented their participation in the chain of custody documentation or because the chain of custody does not contain entries related to putting the specimen into or removing it from secure temporary storage at the collection site. Every effort shall be made to minimize the number of persons handling specimens.

[54 FR 49866, Dec. 1, 1989, as amended at 59 FR 7355, Feb. 15, 1994; 59 FR 43000, Aug. 19, 1994; 61 FR 37699, July 19, 1996]

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(ENDORSED)
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SAN MATEO COUNTY
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Clerk of Superior Court
By UILA LATU
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

385633

RICHARD CARROLL III, Petitioner/Plaintiff, vs. FEDERAL EXPRESS CORPORATION, A Delaware Corporation. Respondent/Defendant.	CIVIL ACTION NO.: PETITION FOR WRIT OF MANDAMUS AND COMPLAINT; JURY DEMAND

PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DAMAGES; JURY DEMAND: COMPLAINT FOR DAMAGES: [1] VIOLATION OF RIGHTS UNDER THE FOURTH

AMENDMENT TO THE UNITED STATES CONSTITUTION; [2] VIOLATION OF FEDERAL REGULATIONS; [3] VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; [4] BREACH OF IMPLIED CONTRACT/WRONGFUL TERMINATION; [5] BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING; [6] DEFAMATION; SLANDER PER SE (CALIFORNIA CIVIL CODE SECTIONS 45 ET SEQ.); [7] VIOLATION OF RIGHTS TO PRIVACY; [8] INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; [9] NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

Petitioner, Richard Carroll, III, petitions this Court for a writ of mandamus under California Code of Civil Procedure Section 1084, or, in the alternative, C. C. P. Section 1094.5 directed to Respondent, Federal Express Corporation, and by this verified petition represents that:

1. Petitioner/Plaintiff, at all times mentioned in this petition, was and is a citizen of the United States and of the State of California, and a resident of San Bruno, California. He presently has a beneficial interest in this petition because he is seeking the reversal of a decision reached by Respondent's internal administrative procedures regarding termination of Petitioner's employment with Respondent.

2. At all times mentioned herein, Respondent/Defendant,

FEDERAL EXPRESS CORPORATION (hereinafter "Respondent", "Defendant" or "Federal Express"), was and is a corporation organized under the laws of Delaware, with its corporate headquarters in Memphis, Tennessee, operating under the laws of the State of California, and doing business in the City of Foster City, County of San Mateo. Respondent/Defendant was Petitioner/Plaintiff's employer from December 5, 1984 to December 17, 1992.

II.

FACTS COMMON TO PETITION AND TO ALL CAUSES OF ACTION

3. Petitioner/Plaintiff was employed by Respondent/Defendant Federal Express. His service commenced on or about December 5, 1984. In his last four years of employment with Respondent/Defendant, Petitioner/Plaintiff worked as a courier. He always scored well above satisfactory on each of his performance review ratings, and received letters from his supervisor praising Petitioner/Plaintiff's "excellent" work. Petitioner/Plaintiff also received numerous recommendations for excellent work from

Respondent/Defendant's customers.

4. Respondent/Defendant is subject to the mandatory "controlled substance testing" regulations of the United States Department of Transportation, Federal Highway Administration, 49 C.F.R. Sections 391.81 et seq., and 49 C.F.R. Part 40, Sections 40.1 et seq. ("regulations".) Said regulations require random drug testing of employees, such as Petitioner/Plaintiff, by private companies such as Respondent/Defendant. Said regulations require the company performing the drug testing to account for the "chain of custody" (integrity of each urine sample) by tracking its handling and storage from point of specimen collection to final disposition of the specimen, and also require a confirmatory second analytical procedure, using gas chromatography/mass spectroscopy to identify the presence of specific drugs or metabolites, independent of the initial test in order to ensure reliability and accuracy of the initial test ("confirmatory test".)

5. Pursuant to the aforementioned federal regulations, Respondent/Defendant has a written policy, the "Fitness for Duty/Drug-Free Workplace Policy", intended to implement the

aforesaid federal regulations to Respondent/Defendant's employees. Respondent/Defendant's said drug-testing policy is embodied in and forms a part of Respondent/Defendant's personnel manual. Attached hereto and incorporated herein as Exhibit A is a true and accurate copy of Respondent/Defendant's PEOPLE Manual, dated November 24, 1992, which sets forth Respondent/Defendant's drug-free workplace policy, including drug-testing requirements.

6. Respondent's/Defendant's drug policy (as stated in Exhibit A hereto) states that employees subject to the United States Department of Transportation drug-testing regulations, such as couriers, are subject to random drug-testing.

7. Respondent/Defendant's drug policy (Exhibit A hereto) further states that

> "An individual's employment is terminated in accordance with the Termination policy... whenever an investigation confirms that the guidelines of the Fitness for Duty/Drug-Free Workplace policy have been violated. Violation occurs when: A verified

positive drug screen indicates drug(s) in employee's system..." (Exhibit A at p. 53.)

8. Pursuant to the requirements of the United States Department of Transportation and the Federal Highway Administration, and of its own corporate drug policy, Respondent/Defendant required Petitioner/Plaintiff to take a random drug test on November 30, 1992, in South San Francisco, California. Petitioner/Plaintiff took said required test.

9. The "Drug Testing Custody and Control" report which accompanied Petitioner/Plaintiff's alleged sample to Respondent/Defendant's testing center in Memphis, Tennessee, indicates that Petitioner/Plaintiff's urine sample was collected in Foster City, California. Petitioner/Plaintiff's urine sample was, in fact, collected in South San Francisco, California. Respondent/Defendant has failed to establish the requisite chain of custody regarding Petitioner/Plaintiff's urine sample. Attached hereto and incorporated herein as Exhibit B-1 through B-5 is the "Drug Testing Custody and Control" report which accompanied

Petitioner/Plaintiff's alleged sample to Memphis, Tennessee.

10. No record exists verifying how Petitioner/Plaintiff's urine sample was collected or transported from South San Francisco to Foster City or any other place.

11. On December 8, 1992, Respondent/Defendant informed Petitioner/Plaintiff that he tested positive for cocaine in his urine. Petitioner/Plaintiff requested that a test of his split sample be made. Petitioner/Plaintiff was subsequently informed by Respondent/Defendant that a split sample, alleged by Respondent/Defendant to be that of Petitioner/Plaintiff, was tested and returned positive.

12. Petitioner/Plaintiff has never used cocaine.

13. Upon being informed by Respondent/Defendant of the aforementioned alleged test results on December 8, 1992, Petitioner/Plaintiff immediately submitted himself to examination by Dr. Glatt, Petitioner/Plaintiff's own doctor, on December 9, 1992. Said doctor found no signs of use of drugs by Petitioner/Plaintiff. The results of the test performed by Petitioner/Plaintiff's own doctor

on December 9, 1992, were negative for the presence of cocaine. Attached hereto and incorporated herein as Exhibit C is a true and accurate copy of the results of the tests performed on December 9, 1992, by Petitioner/Plaintiff's doctor.

14. On December 8, 1992, Respondent/Defendant informed Petitioner/Plaintiff that he would be terminated from his employment with Respondent/Defendant as a result of his alleged violation of Respondent/Defendant's drug-free workplace policy; to wit, the alleged positive results of the alleged drug-testing of Petitioner/Plaintiff's urine. As stated by Respondent/Defendant, "A person's employment is terminated in accordance with the [Respondent/Defendant's] Termination policy whenever an investigation confirms that the guidelines of the Fitness for Duty/Drug-Free Workplace policy have been violated." Attached hereto and incorporated herein as Exhibit D is a true and accurate copy of Respondent/Defendant's summary of Petitioner/Plaintiff's employment history, including "Management's Position/Rationale".

15. Petitioner/Plaintiff's termination from his employment

with Respondent/Defendant for allegedly failing the aforementioned drug test became effective on December 17, 1992. Attached hereto and incorporated herein as Exhibit E is a letter of December 18, 1992 from Respondent/Defendant notifying Petitioner/Plaintiff of his termination date.

16. Petitioner/Plaintiff grieved his termination through Respondent/Defendant's internal grievance procedure. Attached hereto and incorporated herein as Exhibit F is a true and correct copy of Respondent/Defendant's "5-5 Guaranteed Fair Treatment Procedure" setting forth the aforementioned internal grievance procedure.

17. On March 9, 1993, Petitioner/Plaintiff was notified by Respondent/Defendant that Defendant's Appeals Board had reviewed the circumstances surrounding Petitioner/Plaintiff's termination from the employ of Respondent/Defendant, "for violation of the Fitness for Duty/Drug-Free Workplace" policy of Respondent/Defendant and that the Appeals Board had decided to uphold said termination. Said notice informed Petitioner/Plaintiff that Respondent/Defendant

considers the said decision of the said Appeals Board to be final and binding on both Petitioner/Plaintiff and Respondent/Defendant. Attached hereto and incorporated herein as Exhibit G is the aforementioned letter dated March 9, 1993.

18. Respondent/Defendant further informed Petitioner/Plaintiff on March 8, 1993, that "The Appeals' Board's decision is final and binding." Attached hereto and incorporated herein as Exhibit H is the letter of March 8, 1993.

19. Respondent's action was invalid because no proof exists that Petitioner tested positive for cocaine under Respondent's Random Drug Test policy and regulations.

20. This petition is brought from the final decision of Respondent's Appeals Board, as set forth in Exhibit H [letter of March 8, 1993] in regard to Petitioner's termination on the basis of the aforementioned alleged positive test for cocaine.

21. Petitioner has no plain, adequate and speedy remedy in the ordinary course of law to reverse the decision of the Respondent's Appeals Board, other than the relief sought in this petition, in that the

law of the State of California requires that before Petitioner may maintain a tort action against Respondent, he must first successfully attack and set aside the quasi-judicial decision of Respondent's Appeals Board in a mandamus proceeding. Westlake Community Hospital v. Superior Court (1976) 17 Cal. 3d 465, 482-485.

22. Respondent's termination of Petitioner has damaged Petitioner in a sum according to proof, including, but not limited to lost back pay and other employment benefits.

WHEREFORE, Petitioner prays that:

1. A peremptory writ of mandamus be issued ordering Respondent to set aside its decision, and reinstate Petitioner;

2. For damages in a sum according to proof at trial;

3. For costs of this proceeding

4. For such other and further relief as the Court may deem just and proper.

FIRST CAUSE OF ACTION[1]

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1. Plaintiff's First through Eighth Causes of Action may be reached only after Petitioner's Petition has been granted. Westlake Community Hospital v. Superior Court (1976) 17 Cal. 3d 465, 482-485. Plaintiff requests the Court to stay its action until the Petition has been granted.

(VIOLATION OF RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION)

23. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 22, inclusive of this Petition and Complaint and makes them a part of his instant cause of action as though fully set forth herein.

24. Plaintiff has been denied his right to privacy and freedom from unreasonable search and seizure guaranteed by the Fourth Amendment to the United States Constitution by Defendant's conduct of subjecting Plaintiff to search and seizure in violation of his rights, to wit, without creating and/or preserving the chain of custody of the alleged sample of Plaintiff's urine allegedly tested by Defendant and without performing a confirmatory test of Plaintiff's alleged "split sample."

25. Said chain of custody is incomplete and inaccurate in that the collection center designated on the Defendant's records (Exhibit B-1 to this Complaint) is Foster City, California and the Plaintiff gave his urine sample in South San Francisco, California. No record exists verifying how Plaintiff's urine sample was collected or transported

from South San Francisco to Foster City or any other place. Therefore, no support exists for Defendant's allegation that Plaintiff's alleged urine sample contained traces of cocaine. Therefore, the search and seizure of Plaintiff's urine was unreasonable.

26. No confirmatory test of Plaintiff's urine was ever made for the presence of drugs or metabolites.

27. The search and seizure of Plaintiff's urine implicates Plaintiff's rights under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure and from invasion of Plaintiff's privacy. Without the proper chain of custody and requisite confirmatory test, Plaintiff's aforementioned rights under the Fourth Amendment to the United States Constitution have been unreasonably invaded. As a proximate result of the deprivation of Plaintiff's rights guaranteed by the Fourth Amendment to the United States Constitution, by Defendant's aforesaid conduct, Plaintiff has suffered and continues to suffer substantial losses

28. As a proximate result of Defendant's unlawful employment conduct, Plaintiff has suffered damages of lost wages,

and other employment benefits, all according to proof. Plaintiff has further suffered humiliation, embarrassment, mental and emotional distress and discomfort, as the proximate result of Defendant's unlawful employment conduct, as well as forcing him to incur attorneys fees, costs and certain other incidental damages, all according to proof.

29. At all times herein mentioned, and in acting as alleged herein in paragraphs 1 through 28, inclusive, Defendant knew that its conduct was illegal and wrongful, and that Plaintiff depended on his salary and benefits for his sole support. Notwithstanding such knowledge, and acting oppressively, maliciously, and fraudulently towards Plaintiff, with a conscious disregard of his civil and constitutional rights, with the intention of causing or recklessly disregarding the probability of causing injury and emotional distress to Plaintiff, Defendant refused to cease and desist from subjecting Plaintiff to the conduct alleged above and, instead, violated Plaintiff's civil and constitutional rights against the unreasonable search and seizure complained of herein and terminating him from his

employment with Defendant as the result of said unreasonable search and seizure. Defendant's conduct warrants an assessment of punitive damages as alleged herein according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

SECOND CAUSE OF ACTION

(VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION)

30. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 29, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

31. By committing the above-referenced acts against Plaintiff in his employment with Defendant as alleged herein, and terminating him, Defendant has caused Plaintiff to be denied his rights, privileges and immunities guaranteed by the Fifth Amendment to the United States Constitution, namely his right to procedural due process in the taking of his urine sample and his substantive due process right to his job. Defendant's actions constitute an arbitrary action adversely affecting Plaintiff's property rights in his urine and in

his job, which rights are protected by the Fifth Amendment.

32. At all times mentioned herein and in acting as alleged herein in paragraphs 1 through 31, Defendant's conduct has resulted in damage to Plaintiff in the form of the loss of his employment with Defendant, wages and all other benefits of employment according to proof at trial, and warrants an assessment of punitive damages as alleged in paragraph 29 above.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

THIRD CAUSE OF ACTION

(VIOLATION OF FEDERAL REGULATIONS)

33. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 32, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

34. The United States Department of Transportation has issued Regulations, 49 C.F.R. Sections 40.1 et seq. and 49 C.F.R. 391.81, mandating drug-testing of certain employees, including Plaintiff. Said regulations are mandatory upon Defendant and have

been adopted by Defendant and incorporated into its "Fitness for Duty/Drug-Free Workplace" policy (Exhibit A to this Complaint).

35. Pursuant to said federal regulations, Defendant subjected Plaintiff to a random drug-test on November 30, 1992, as more fully set forth above. In its testing of Plaintiff, Defendant violated the aforesaid federal regulations in failing to provide the requisite documented chain of custody and confirmatory test, all as required by said regulations, all in violation of Plaintiff's rights under the aforesaid federal regulations, with resulting damage to Plaintiff in the form of the loss of his employment with Defendant, wages and all other benefits of employment according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

FOURTH CAUSE OF ACTION

(VIOLATION OF RIGHTS TO PRIVACY)

36. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 35, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

37. By committing the above mentioned acts, Defendant violated Plaintiff's constitutional right to privacy under both the federal and state Constitutions (Fourth Amendment to the United States Constitution; Article I, section 1 to the Constitution of the State of California), in that Defendant subjected Plaintiff to drug-testing without the requisite chain of custody, and failed to perform the requisite confirmatory testing, all to the damage of Plaintiff in an amount according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth

FIFTH CAUSE OF ACTION

(BREACH OF IMPLIED CONTRACT/WRONGFUL TERMINATION)

38. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 37, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

39. Plaintiff was employed by Defendant for approximately eight (8) years and was terminated on December 17, 1992, on the

grounds that he allegedly tested positive for cocaine.

40. Plaintiff was employed by Defendant under an oral contract of employment as modified by certain policies, practices, assurances and other statements, both oral and in writing and more particularly by the "Fitness for Duty/Drug-Free Workplace" policy (Exhibit A to this Complaint). Plaintiff had a contract of employment for an indefinite term. This indefinite term was to continue as long as Plaintiff performed his job in a satisfactory manner, and discharge, if any, would only be for a good cause proven and then would be carried out only in accordance with the stated policies of the employer, Defendant FEDERAL EXPRESS. Plaintiff, therefore, had an expectation of continued employment with discharge only for good cause proven based upon the Defendant's aforesaid Fitness for Duty/Drug-Free Workplace policy; to wit, that he would continue to be employed by Defendant unless he tested positive for drug-use.

41. In addition, Plaintiff had a significant length of service, having worked for Defendant for eight years; received on many

occasions letters of recommendation from Defendant's customers. He was told on many occasions by Defendant's management that he was doing an excellent job; and received good performance evaluations.

42. Plaintiff received and relied upon specific assurances oral and written, and specifically the Defendant's personnel manual which stated the aforesaid Fitness for Duty/Drug-Free Workplace Policy (Exhibit A to this Complaint) that Defendant would continue the employment relationship with Plaintiff for as long as Plaintiff continued to perform his job adequately and satisfactorily and did not test positive for drug use. Plaintiff relied upon aforesaid policy to conclude that Plaintiff and Defendant had entered into an implied contract that Plaintiff would not be discharged unless there was good cause to do so.

43. Based upon the Fitness for Duty/Drug-Free Workplace Policy aforesaid, Plaintiff had an employment contract with Defendant that he would be employed by Defendant so long as his performance was satisfactory and that Defendant would not discharge him without good and just cause.

44. Plaintiff at all times fulfilled his duties and conditions under the contract and has been ready, willing and able to continue performing them in a competent and satisfactory manner.

45. Notwithstanding the implied promise to terminate the employment contract only for good cause, Defendant terminated Plaintiff's employment on December 17, 1992 based on the false basis that Plaintiff had allegedly tested positive for cocaine.

46. As a proximate result of Defendant's breach of the employment contract, Plaintiff has suffered and continues to suffer losses in earnings and other employment benefits, to his damage, in an amount to be established at trial.

47. Defendant has stated that Plaintiff tested positive for cocaine and that good cause existed for his termination, which was false and a mere pretext.

48. Defendant's actions violated company policies, that Plaintiff could be terminated only for good cause, to wit, testing positive for drug use. Plaintiff did not test positive for cocaine and he was denied the opportunity to present evidence in his defense to show

that he was not a user/abuser of cocaine, to wit, the results of the drug-test performed by Plaintiff's own doctor performed on December 9, 1992 (Exhibit C.). Defendant employer did not treat Plaintiff in a fair and honest manner, and accused him of using cocaine without any evidence to support said false, pretextual allegation.

49. The above-said acts of Defendant employer constitute a wrongful termination of Plaintiff's employment and such wrongful termination was a substantial factor in causing damage and injury to Plaintiff as set forth below.

50. As a result of the aforesaid acts of Defendant, Plaintiff has lost and will continue to lose income and and all other employment benefits in an amount to be proven at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

SIXTH CAUSE OF ACTION

(BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING)

51. Plaintiff hereby adopts and incorporates by reference

paragraphs 1 through 50, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

52. Impled by law into Plaintiff's employment agreement with Defendant was, at all times relevant hereto, a covenant of good faith and fair dealing by which Defendant promised to give full cooperation to Plaintiff in his performance under said agreement and to refrain from any act which would prevent or impede Plaintiff from performing all of the conditions of the agreement to be performed by him, or any act that would prevent or impede Plaintiff's enjoyment of the fruits of said contract. Specifically, said Covenant of Good Faith and Fair Dealing required Defendant to fairly, honestly and reasonably perform the terms and conditions of the agreement.

53. Plaintiff, with no legal representation or prior experience in entering into such employment contracts as the one alleged herein, was in an inherently unequal bargaining position in his dealings with Defendant. In addition, once Plaintiff committed himself to the above-stated contract and took the reasonable actions alleged herein in reliance, Plaintiff was placed in a particularly vulnerable position

because he had given up secure employment with his prior employer to form a career with Defendant, and few openings and opportunities exist in his field for persons of his experience and qualifications. He had entrusted his entire livelihood to Defendant's willingness to perform its obligations under the contract, and risked suffering grave harm if Defendant failed to perform. Defendant was aware of Plaintiff's vulnerability in this regard.

54. The primary motivation of Plaintiff Carroll in making the above-stated contract and continuing to perform said contract was to obtain secure employment and terms and conditions of employment which would permit him growth and development as a courier at FEDERAL EXPRESS.

55. Defendant breached its duty of good faith and fair dealing towards Plaintiff by:

a) Subjecting Plaintiff to unreasonable search and seizure, in violation of the Fourth Amendment to the United States, relevant federal regulations, and Defendant's corporate policies;

b) By failing to follow the relevant federal regulations and

Defendant's corporate personnel policies in regard to random drug testing;

c) By terminating Plaintiff as a result of the unreasonable search and seizure.

56. As a proximate result of Defendant's breach of the covenant of good faith and fair dealing. Plaintiff has suffered and continues to suffer substantial losses as alleged in paragraph 50 herein all according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

SEVENTH CAUSE OF ACTION

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

57. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 56, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

58. Defendant's conduct was intentional and malicious and done for the purpose of causing Plaintiff to suffer emotional distress.

59. As a proximate result of the aforementioned acts,

Plaintiff suffered emotional distress, and has been injured in his mind in an amount according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

EIGHTH CAUSE OF ACTION

(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)

60. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 59, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein.

61. When Defendant acted as aforementioned, it was foreseeable that its actions would cause serious emotional distress to Plaintiff. Notwithstanding its knowledge of same, or the fact that it should have known that such a result would probably occur, Defendant continued in its course of wrongful conduct as alleged herein.

62. The above-said acts of Defendant, constituted a negligent infliction of emotional distress on Plaintiff herein. Plaintiff suffered mental and emotional distress. As a result of same, Plaintiff claims

damages according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

NINTH CAUSE OF ACTION

(DEFAMATION; SLANDER PER SE
(CALIFORNIA CIVIL CODE SECTIONS 44 ET SEQ.)

63. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 62, inclusive of this complaint and makes them a part of his instant cause of action as though fully set forth herein

64. On or about February 23, 1993, Defendant, acting through its agent and employee Nancy Baggot, acting in the course and scope of her employment for Defendant, published and spoke the following words of and concerning Plaintiff Carroll:

"he tested positive for cocaine."

The words were false, in that Plaintiff never tested positive for cocaine.

The words were heard by Administrative Law Judge Bryan M. Yagi and Robin West, attorney for Defendant, and several other persons whose names are not presently known to Plaintiff.

65. These words were slanderous per se because they falsely and without privilege charged Plaintiff with a crime; to wit, the use of a controlled substance; and, tended directly to injure him in respect to his profession and business by imputing to him general disqualification regarding his occupation; to wit, that he uses a controlled substance.

66. The words carried a defamatory meaning because they tended to indicate that Plaintiff had committed a criminal act; to wit, the use of a controlled substance.

67. The words were understood by those who heard them in a way which defamed Plaintiff because they charged him with crime and tended directly to injure him in respect to his profession and business.

68. The above-described words were spoken with malice by Defendant because of its feelings of hatred and ill-will toward the Plaintiff and with a desire to oppress Plaintiff and acted in the manner as alleged herein.

69. As a proximate result of the above-described words, Plaintiff has suffered general damages to his reputation in an amount

according to proof at trial.

WHEREFORE, Plaintiff prays for judgment against Defendant as hereinafter set forth;

70. Plaintiff herein requests a jury trial.

WHEREFORE, Plaintiff prays for judgment against Defendants as hereinafter alleged follows:

1. For general and special damages according to proof;

2. For exemplary and punitive damages according to proof;

3. For attorney fees under California Code of Civil Procedure Section 1021.5 and costs;

4. For all other costs of suit herein incurred;

5. For such other and further relief as the Court may deem proper.

DATED: October 29, 1993

LAW OFFICES OF DANIEL RAY BACON

/s/ Daniel Ray Bacon
DANIEL RAY BACON
ATTORNEY FOR
PETITIONER/PLAINTIFF
RICHARD CARROLL

VERIFICATION

I, Richard Carroll III, am the Petitioner/Plaintiff in this action. I have read the foregoing Petitioner and Complaint and know the contents thereof. All facts alleged in the above Petition and Complaint are true of my own personal knowledge. I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this document was executed by me on October 29, 1993, at San Francisco, California.

/s/ Richard Carrol III
RICHARD CARROLL III
PETITIONER/PLAINTIFF

carroll/complaint

* Date of Infraction

* Facts supporting the suspension, warning letter, and/or termination

* Policy violated

* A reference to the employee's privilege to pursue the Guaranteed Fair Treatment Procedure (GFTP)

NOTE: All disciplinary actions normally should be initiated within 7 calendar days of the conclusion of the investigation.

Receipt of the letter should be confirmed by the employee's signature, or if the employee refuses to sign, a witness should confirm receipt. The manager must retain all original documents, provide a copy to the employee and matrix Personnel representative, and forward a copy to the Personnel Information Control Center (PICC) for retention in the employee's personnel file.

DISCHARGE APPROVAL: Two levels of line management and a matrix Personnel Services staff member must approve all discharges based on misconduct when he Individual holds a managing director or below position. For positions above managing director, the matrix Personnel managing director should be consulted.

EMPLOYMENT AT WILL: The employment relationship between the Company and any employee may be terminated at the will of either party as stated In the employment agreement signed upon application for employment. As described In that agreement, the policies and procedures set forth In this manual provide guidelines for management and employees during employment but do not create contractual rights regarding termination or otherwise.

EMPLOYEE RESPONSE/COMPLAINTS: Any employee who feels he is the recipient of unwarranted discipline should discuss the problem informally with his manager and/or his matrix Personnel staff and/or use the Guaranteed Fair Treatment Procedure (GFTP).

RELATED POLICIES:

* Career Opportunity
* Code of Business Conduct
* Department of Transportation Qualification/Driving Documentation
* Firearms/Weapons
* Fitness for Duty/Drug-Free Workplace
* Guaranteed Fair Treatment Procedure (GFTP)
* Leave of Absence (Medical, Military, and Personal)
* Performance Improvement
* Revenue and Nonrevenue Ground Vehicle Accident Prevention
* Security
* Solicitation and Distribution
* Termination

2-10 Fitness for Duty/Drug-Free Workplace
(Last Revised 24 Nov 92)

POLICY: Federal Express is committed to a drug-free workplace in the interest of safety for its employees and the public. The Company supports and complies with all applicable federal and state laws and regulations through enactment of this policy. Federal Express reserves the right to perform a drug screen on any employee at any time.

Drugs - Federal Express prohibits the unauthorized possession, sale, manufacture, distribution, known transportation, or nonprescription use of controlled substances (including but not limited to opiates, marijuana, Phencyclidine (PCP), amphetamines, cocaine, and other addictive drugs regulated by the Department of Transportation (DOT). In particular, the Company expressly prohibits unlawful drug usage by its employees at any time, on or off duty.

Abuse of Legitimate Prescription - Federal Express prohibits the abuse of legitimately prescribed drugs while on or off duty. Abuse includes dependency and/or using a drug for reasons other than for the purposes of the initial prescription by the individual for whom the drug was prescribed. Abuse also includes an employee's use of a drug for a bona fide condition when the drug was prescribed for another person,

such as a friend or family member.

Alcohol - Unauthorized possession, use, or being under the influence of alcohol is prohibited while on Company property. Consumption of alcoholic beverages is also prohibited during working hours. Including, for the purpose of this policy, the meal period, breaks, and standby/on-call hours.

SCOPE: All Federal Express employees and all persons entering Company buildings, aircraft, vehicles, or property, (Employees on leave of absence are also covered by this policy.)

GUIDELINES:
DOT-REGULATED POSITIONS (FAA AND FWHA) AND CRITICAL POSITIONS

Special Restrictions: The following categories of employees may be subject to additional restrictions on the use of drugs, including prescription drugs and alcohol:

* Employees subject to Department of Transportation (DOT) (i.e., Federal Aviation Administration [FAA] and Federal Highway Administration [FHWA]) drug-testing regulations.

* Employees determined to be in "safety sensitive" positions, as determined by line management with concurrence of the Drug-Free Workplace Program Administration In Corporate Safety and Health Department, Personnel Services, and Legal (i.e., hub and ramp employees, FAA and DOT-covered employees).

The appropriate regulations should be consulted to determine the specific applicable limitations.

At Federal Express, the following employees are covered. (This list is not all inclusive and is subject to change whenever Company and/or government requirements change.)

FAA Positions
Aircraft Mechanics
Flight Crew Members

Flight Attendants
Flight Controllers
Flight Planners
System Controllers
Flight Instructors
Ground Instructors (Flight and Maintenance)
Security Guards
Ramp Agents

FHWA Positions
All employees who must
meet the qualifications in
conformance with DOT regulations
Including the following:
Couriers
CTV Drivers
Tractor Trailer Drivers
Dispatcher/DOT
Service Agent/DOT
Vehicle Mechanics
Courier/Handler/DOT
Handler/DOT

* Includes any employee who Performs Preventive maintenance or repairs on an aircraft or any aircraft component.

* Ramp agents are considered 'Aircraft Dispatchers' by the FAA and are covered under the FAA program for random and post-accident testing. In addition, ramp agents are also covered under the FHWA program for periodic physicals.

NOTE: All employees subject to DOT (FAA and FHWA) regulations must be given a Drug Testing Program Communication Packet when entering these positions.

Prescription Use Notification

Employees determined to be in "safety sensitive" positions who are taking prescription drugs prescribed for their own use (including but not limited to central nervous system depressants and stimulants and

narcotic analgesics) that may jeopardize their safety or the safety of other employees or the public while they are performing their normal duties must provide management with a doctor's statement attesting that the prescription drugs will not interfere with their ability to perform their normal duties and responsibilities. Federal Express reserves the right to have any treating doctor's recommendation reviewed by the Company's medical review officer (MRO) to determine applicability to Federal Express. If a dispute between the MRO and the employee's personal physician occurs, the vice president of Personnel Services makes the final decision. The vice president may consult with other professionals or resources as necessary to make a decision When possession or usage is unauthorized, other policy provisions apply. (Refer to Discipline /Termination guideline.)

Prereport Restrictions/Time Frames

The use of alcohol within 8 hours of reporting to work Is prohibited for FHWA- and FAA-regulated positions. Flight attendants are prohibited from consuming alcohol beverages 12 hours prior to duty. All crew members are also prohibited from using any drug or medication 12 hours prior to duty in accordance with FAA regulations unless a physician certifies that the drug or medication does not impair their ability to perform their job.

Special Testing Requirements

Federal laws dictate that all DOT-regulated (FAA and FHWA) positions are subject to special testing as outlined in Table 1.

Table I

Testing Requirements for Federal Express-Designated DOT-Regulated Positions:

Federal Highway Administration (FHWA) Positions and Federal Aviation Administration (FAA) Positions

* Preemployment and transfer to covered position
* Random
* Postaccident (Aircraft)
* For Cause/Reasonable Suspicion
* Return to Work

* Unannounced for postsubstance abuse treatment or by MAO recommendation

NOTE: When required to submit a sample for a drug screen, employees are paid for actual time up to 1 hour spent at the collection site. Pay for time over 1 hour requires management approval. Flight crew members including flight attendants) are considered as remaining on duty when providing a sample for random drug screen . . .

Removal from Position

Persons in DOT-regulated or other critical or safety-sensitive positions, e.g. operating machinery, may be removed from their positions at any time when deemed essential for safety.

CONVICTION NOTIFICATION

Employees convicted under a criminal drug statute for violation must provide written notification to their management no later than 5 calendar days after the conviction. The manager must provide notification to the Legal Department who in turn, reports the conviction to the government.

TERMINATION

An individual's employment is terminated in accordance with the Termination policy or applicable flight attendant contract provisions whenever an investigation confirms that the guidelines of the Fitness for Duty/Drug-Free Workplace policy have been violated. Violation occurs when:

* A verified positive drug screen indicates drug(s) in employee's system.
* There is unauthorized possession or use of alcohol or use or possession of an illegal drug by the employee.
* An employee refuses to provide a urine sample for a drug screen, adulterates the urine specimen, or refuses to submit to an alcohol test.
* An employee requests substance abuse treatment after notification of testing.
* An employee falls to show for a scheduled random or other required test after receiving notification.
* Discovery or voluntary disclosure of illegal drug violation occurs after completion of the one-time treatment.

* Discovery or voluntary disclosure of alcohol or prescription drug abuse occurs after completion of second treatment program.
* An employee refuses to sign the Chain of Custody form or Initial the split sample statement on the Chain of Custody form.
* Employee falls to comply with prescribed treatment program and/or aftercare program.

Medical benefits, employment status, and absence from work for drug and alcohol or prescription drug abuse are outlined in Tables 2 and 3.

Under this new program, as well as other medical programs employees may be disciplined under the Attendance policy applicable to their position.

NOTE: Employees terminated for Fitness for Duty violation are ineligible for rehire.

GUARANTEED FAIR TREATMENT PROCEDURE/POSITIVE FFDP VIOLATIONS

Guaranteed Fair Treatment Procedure Step 1 investigations and recommendations as well as any other investigations following a positive drug screen that are related to FFDP violations terminations must include the items listed below. Crew members need to refer to the *Flight Crewmembers* Handbook. Flight Attendants need to refer to agreement.

* Concurrence of both the matrix Personnel Services managing director and Drug-Free Workplace Program management.
* Consultation with both the medical review officer (MRO) and a Labor and Employment attorney in the Federal Express Legal Department.

NOTE: A conference call can be used to accomplish these concurrences and consultations if desired.

POLICY VIOLATION DISCOVERY

Regulated Positions Testing: To ensure compliance with federal regulations and Company Fitness for Duty Drug-Free Workplace policy, employees subject to DOT (FAA or FHWA) drug testing regulations are

subject to special testing requirements outlined In Table 1 in the "DOT-Regulated Positions" guideline.

The following are the five categories of policy violation testing and discovery:

All Company Positions/Reasonable Suspicion

An employee in any position may be tested when there is reasonable suspicion that the employee has violated the Fitness for Duty/Drug-Free Workplace policy. Reasonable suspicion may be established by an investigation which may Include but Is not limited to the following:

* Observation of the employee's behavior, such as direct observation of drug use or possession and/or the physical symptoms of being under the Influence of drugs
* Reports from employees or other witnesses
* Abnormal conduct or erratic behavior
* Evidence that the employee has tempered with the collection process

If an employee is suspected of using unauthorized drugs the appropriate manager gathers all Information, facts, and circumstances leading to and supporting this suspicion.

Testing to support 'reasonable suspicion' may be performed only after consulting Legal, Personnel, and the Drug-Free Workplace Program Administration In Corporate Safety and Health Department. When testing confirms policy violation, the employee Is terminated In accordance with the Termination Policy (refer to Observed Policy Violation procedure.)

NOTE: It management suspects use of alcohol by an employee and Is unable to contact any of the departments listed above due to schedule of operation, the manager may use another member of management as a witness and request the employee to submit to a breathalyzer to determine alcohol use. Management is responsible for obtaining transportation from work to home for the employee.

In cases Involving suspicion of use of controlled substances, the employee should be suspended with pay until the departments listed above can be notified. Management Is responsible for obtaining transportation from work to home for the employee.

Self-Disclosure by Employee

Employees who voluntarily enter treatment for a substance abuse problem (alcohol or drug) are tested before returning to work and are subject to unannounced testing for the remainder of their employment. (Refer lo Voluntary Disclosure/Treatment procedure).

Employees may not return to work until they have been assessed and approved by the MRO. The assessment for all employees must Include a drug screen test and/or blood alcohol test appropriate for the type of rehabilitation. The results of the test(s) must be negative before the MRO may authorize the employee to return to work. An employee In a position that is not safety-sensitive who is not authorized to return to work for to a previous position) Is handled in accordance with the Medical Absence/Leave of Absence (Medical) policy.

Employees who were in safety-sensitive positions prior to treatment may not return to a safety-sensitive position unless approved by the MRO. If return to a safety-sensitive position Is denied, the employee's condition will be monitored and assessed for a minimum of 2 years, during which the MRO may approve the return to a safety-sensitive position. Nonbargaining unit employees who are determined physically unable to return to a safety-sensitive position by the MRO are handled in accordance with the Medical Absence/Leave of Absence (Medical) policy.

Admission Upon Observed Violation or Notification of Selection for Testing

An employee who admits policy violation upon being observed or

notified of selection for testing is terminated in accordance with the Termination policy or flight attendant contract, as applicable. In some circumstances, testing may not be required. For example, testing is not required if the employee signs a statement verifying admission.

Admission During The Course of An Investigation of Past Off-Duty Use

When an employee who is not the targeted or central figure of an investigation admits to past off-duty use of illegal drugs, managers should consult with Legal. Personnel Services, and the Drug-Free Workplace Program Administration in the Corporate Safety and Health Department. Normally, the employee Is required to take a drug screen. If an employee refuses to provide a urine sample for the drug screen or if the drug screen is positive, the employee is terminated. If the drug screen is negative, the employee is referred for medical evaluation and. if necessary, rehabilitation. Upon return to work, the employee is subject to unannounced testing for the remainder of employment with Federal Express.

Report of Controlled Substance Convictions

Employees who are convicted of controlled substance violations under any criminal drug statute or who plead guilty or nolo contenders (no contest) to such charges must inform Federal Express management within 5 days of conviction or plea. Failure to do so results in disciplinary action, including termination.

ASSESSMENT AND TESTING REQUIREMENTS

Company's Right to Assess and Test All applicants are required to pass a drug screen. Applicants who are applying for DOT-regulated or safety-sensitive positions receive their drug screens during their medical examinations after their job offer. However, job offers are contingent upon successful completion of the medical examination and screening. Applicants for positions that are not safety sensitive receive their drug screens prior to receiving a job offer. An applicant who tests positive is ineligible for hire for a minimum of 2 years. At that time, the applicant is ineligible for consideration in a safety sensitive position unless certified by MRO as being physically fit for consideration.

Federal Express reserves the right to request an employee or groups of employees to submit to assessment and testing when, based on observed behavior or other information, there is reason to believe the employee has used drugs or alcohol in violation of the Fitness for Duty/Drug-Free Workplace policy. Failure to submit to this assessment and test results in termination.

If an employee admits abuse of a drug or alcohol or requests substance abuse treatment after a scheduled test is initiated, the testing process is completed. If the test is positive, the employee is terminated. if the test is negative, the MRO conducts a health assessment and determines appropriate action to be taken.

When benefits related to substance abuse are accessed through Group Health or the Psych Managed Care Program, the Drug-Free Workplace Program Administration in Corporate Safety and Health Department and/or the medical review officer (MRO) are contacted. The Drug-Free Workplace Program Administration In Corporate Safety and Health Department/MRO coordinates with the manager to administer a collection for testing as needed.

Pretest Approvals

To ensure compliance with various state and local laws. the Legal, Personnel, and Corporate Safety and Health departments must be notified before administration of any drug or alcohol collection for testing for **reasonable suspicion**. Under no circumstance is a urine collection or a blood/alcohol test based on reasonable suspicion performed without the prior approval of the Legal Department.

Employee Signed Statements

There are several situations during which a signed and dated statement must be received from the employee.

* Administration of a blood collection for testing requires signed/dated permission from the employee to have blood withdrawn.

* An employee treated for substance abuse must sign/date a Statement of Understanding before returning to work. A copy of this statement should be forwarded to the Drug-Free Workplace Program Administration In Corporate Safety and Health Department (See Figures I and 2.)

* Employee must sign the Chain of Custody form during collection.

NOTE: Collection for testing is not required if the employee signs and dates a statement admitting policy violation.

Management Responsibility

The manager must ensure that any required statements are obtained. The manager must retain a signed copy in the employee's file and forward a copy to PICC for permanent filing. The Security Department retains copies of any statements obtained as a result of a security investigation.

Management is responsible for promptly scheduling all required collection tests. When notified to conduct any test any exceptions should be coordinated in advance with the Drug-Free Workplace Program Administration In Corporate Safety and Health Department.

An employee who is subject to unannounced testing must provide a contact number when going on any type of leave. The manager is responsible for obtaining the contact number for the duration of the leave. The manager may obtain the number when approving the leave.

Testing Methods/Restrictions

Verifications of impaired performance may be accomplished through statements of witnesses who observe the behavior or by testing with the protest approvals noted above.

When available, a breathalyzer may be used to test for alcohol. Blood may be tested for alcohol only with the employee's written consent.

Urinalysis is performed to test for drugs other then alcohol. The urine must be analyzed by the laboratory authorized by the Drug-Free Workplace Program Administration In Corporate Safety and Health Department. Drug screen kits and the related Custody and Control Form, FedEx-M-2033, are available from LOGOS (102756).

If an employee is unable to void after a reasonable amount of time, the employee is required to drink 8 to 16 ounces of water every ½ hour for 4 hours or until the end of the employee's shift, whichever is smaller. In the case of reasonable cause or a post-accident testing, this time limit can be extended up to 8 hours from the beginning of the collection procedure. It an employee is unable to void following a period of water intake, the employee is released and subject to an unannounced collection for testing in the near future.

Company and federal regulations disallow a second collection for testing when there Is an MRO-confirmed positive result on the first test.

Non-DOT Employees
Statement of Understanding - Voluntary Drug
Rehabilitation and Follow-Up Testing

I am aware that I must contact the medical review officer (MRO) at 901 797-5903 before returning I work. I understand that aftercare is mandatory. I also am aware that I must contact People Help to verify that aftercare is initiated. People Help is required for all employees including those who use Health Maintenance Organizations (HMO).

I am aware that contact with People Help Is also required If I use a Health Maintenance Organization (HMO). I agree to undergo a post-treatment drug screen and to test negative before returning to work. I also agree to submit myself to periodic unannounced screenings throughout my employment with Company as requested by the Company. I also agree that if my rehabilitation was for alcohol treatment, I will submit to both a urine drug screen and a blood

alcohol test at the discretion of the MRO. Furthermore, I understand that the MRO has discretion to decide whether to test for drugs other then opiates, amphetamines, PCP, marijuana, and cocaine depending on the facts in my case. I understand that if I test positive on any drug screen after I return to work my employment will terminated In accordance with the Fitness for Duty/Drug-Free Workplace policy. In consideration for being allowed to return to work, I agree to waive any statutory or other rights existing under federal, state, or local laws which may apply I to employee drug screens initiated, requested, or conducted by employers.

Furthermore, I also agree to waive any right to privacy and submit to an observed urine collection procedure if there is a reason to believe that the specimen has been altered or substituted.

Signature_____

Employee No._____

Date_____

Please sign and return to:

Drug-Free Workplace Program
2900 Airport Business Park
Memphis, TN 38118-2901
COMAT: MEM/TN/38194-2901 **EXHIBIT A-9**

DOT Employees
Statement ol Understanding -Voluntary Drug
Rehabilitation and Follow-Up Testing

I am aware that I must contact the medical review officer (MRO) at 901 797-5903 before returning to work. I understand that aftercare is mandatory. I am also aware that I must contact People Help to verify that aftercare is initiated. People Help is required for all employees including those who use Health Maintenance Organizations (HMOs).

I agree to undergo a post treatment drug screen and to test negative before returning to work. I also agree to submit myself to periodic unannounced screenings throughout my employment with Company

as requested by the Company. I also agree that if my rehabilitation was for alcohol treatment, I will submit to both a urine drug screen and a blood alcohol test at the discretion of the MRO. Furthermore, I understand that the MRO has discretion to decide whether to test for drugs other than opiates, amphetamines, PCP, marijuana, and cocaine depending on the facts in my case. I understand that if I test positive on any drug screen after I return to work my employment will be terminated in accordance with the Fitness for Duty/Drug-Free Workplace policy. In consideration for being allowed to return to work, I agree to waive any statutory or other rights existing under federal, state, or local laws which may apply to employee drug screens initiated, requested, or conducted by employers.

Furthermore, I also agree to waive any right to privacy and submit to an observed urine collection procedure in compliance with the Department of Transportation (DOT) regulations if there is a reason to believe that the specimen may be altered or substituted. The following circumstances are the exclusive grounds constituting reason to believe that the specimen has been altered or substituted:

1. Presentation of urine specimen that falls outside the normal temperature range (32.5□-37.7□C, 90.5□-99.8□F), and

A. The employee declines to provide a measurement of oral body temperature, or

B. Oral body temperature varies by more than 1□C, 1.5□F from the temperature of the specimen.

2. The last urine specimen provided was determined by the laboratory to have a specific gravity of less than 1.003 and a creatinine concentration below .2g/L.

3. The collection site person observes conduct clearly and unequivocally indicating an attempt to substitute or adulterate the sample (e.g., substitute urine in plain view, blue dye in specimen presented, etc.)

4. It has previously been determined that there was use of a controlled substance without medical authorization and the particular test being conducted under a DOT agency regulation providing for follow-up testing upon or after returning to service.

Signature_____

Employee No._____

Date_____

Please sign and return to:

Drug-Free Workplace Program
2900 Airport Business Park
Memphis, TN 38118-2901
COMAT: MEM/TN/38194-2901 **EXHIBIT A-10**

Use of Split Sample

The employee is responsible for producing a usable split sample.

The first test results are not invalidated if the employee fails to provide sufficient urine for the split sample or fails to complete the paperwork properly. In accordance with DOT regulations, only a positive or negative confirmation is reported on a split sample.

Sample Tampering/Direct Observation

If there is evidence that the employee has tampered with a sample, the collection process is repeated under direct observation. Both the initial and observed samples are sent to the lab for testing.

Refusal to Sign/Failure to Appear for Collection for Testing

An employee who does not appear as notified for a scheduled collection for random or any other required testing (drug or alcohol) is terminated.

An employee who refuses to sign the Chain of Custody form or Initial the split sample statement on the Chain of Custody form is terminated.

An employee may not be terminated solely on the basis of refusing to sign an admission statement. However, an employee who refuses to sign a Statement of Understanding of the Fitness for Duty/Drug-Free Workplace policy and future unannounced collection for testing requirements is terminated. All new hires and transfers into covered positions are given this information as part of their orientation training process.

Test Monitoring

Corporate Safety and Health Department/medical review officer monitors the results of all drug and alcohol tests and confirms evidence of substance abuse.

MEDICAL REVIEW OFFICER (MRO)

In compliance with DOT regulations, an independent physician is retained by the Company as its medical review officer (MRO) to assist with the Fitness for Duly/Drug-Free Workplace policy. The assigned MRO is responsible for the following:

* Ensures the validity of drug and alcohol test results.
* Assists Federal Express employees in obtaining adequate treatment.
* Reviews evidence provided by employee of employee's participation in treatment before approving return to work.
* Determines the effect that employees with drug and alcohol problems have on safety at the workplace.
* Assesses the health of employees with alcohol and drug problems.

TREATMENT PROGRAMS/AFTERCARE

In keeping with its People-First philosophy, Federal Express ensures several treatment options are available for employees as discussed below. Failure to comply with treatment or continuing care, as determined by the MRO and vice president of Personnel Services, results in termination.

People Help

People Help Program is designed to provide professional assistance, consultation, information, and counseling for employees experiencing personal problems, including but not limited to drug and alcohol abuse. This service is provided through an independent provider on contract with Federal Express. It is available, without cost, to all nonbargaining unit employees and their dependents (refer to *Your Employee Benefits* book for additional information). Bargaining unit employees' benefits are provided in accordance with their agreement.

Psychiatric, Alcohol and Drug Treatment Programs

Treatment for alcohol and drug use Is integral to the Fitness for Duty/Drug-Free Workplace policy. These programs must be entered prior to testing notice. Federal Express Group Health provides benefits to be used for treatment costs subject to normal Group Health Plan limitations. Employees in the Federal Express Group Plan must use the Managed Care Program to ensure quality care, to coordinate reentry to the workplace, and to receive benefit reimbursement. (Refer to *Your Employee Benefits* book for details). Flight attendants should refer to their agreement. Flight crew members should refer to the *Flight Crewmembers Handbook* and *Flight Operations Manual.*

Health Maintenance Organizations (HMOs)

Programs and benefits for employees covered under Health Maintenance Organizations (HMOs) are specified by each plan.

Continuing Care

Continuing Care is mandatory. Once transition from initial treatment is complete, the employee must contact People Help to verity that aftercare is initiated. This includes employees who use HMOs. People Help works with the Managed Care Program and/or the HMO to ensure aftercare is set up. People Help monitors the employee for a minimum of 1 year to confirm the employee follows the aftercare program. Aftercare may vary, based on diagnosis, severity, and location.

TREATMENT AND DISABILITY BENEFITS LIMITATIONS

Illegal Drug Abuse

Eligible nonbargaining unit employees receiving treatment for drug abuse may receive short-term disability benefits on a one-time basis only and for a maximum of 13 weeks. Once disability benefits are used for substance abuse, they may not be used again even when the employee used less than the entire 13 weeks allowed for substance abuse treatment.

Bargaining unit employees should refer to their agreement for benefits. Flight crew members should refer to the *Flight Crewmembers Handbook* and *Flight Operations Manual.* (See Table

2.)

An employee who receives primary treatment for substance abuse is expected to use the necessary aftercare and support programs to ensure long-term recovery. After the one-time only treatment for illegal drugs, any documentation of use or treatment for drugs beyond the aftercare, as determined by the Company, results in termination of employment.

Alcohol Abuse and Prescription Dependency

Employees who need treatment for alcohol or prescription abuse are allowed a maximum of two absences for treatment but receive benefits for the first absence only.

Eligible nonbargaining employees who require treatment for alcohol abuse or are dependent upon a prescribed medication for reasons other then its in prescription may receive short-term disability benefits on a one-time only basis a maximum of 13 weeks. Once disability benefits are used for alcohol or prescription abuse, they may not be used again even if the employee used less than the entire 13 weeks allowed for initial treatment. Bargaining unit employees should refer to their agreement for benefits. Flight crew members should refer to the *Flight Crewmembers Handbook* and *Flight Operations Manual*.

An employee who has already used the short-term disability benefits for prescription abuse but needs to begin treatment for a second time may take a personal leave of absence. This second absence for treatment is personal leave and is for a maximum of 90 days.

An extension of the 90-day maximum may be allowed only when needed to complete job-related certification procedures. (See Table 3.)

After an employee has returned from the two allowed absences for treatment, and documentation of additional treatment beyond the allowed aftercare or disclosure or discovery of continued alcohol use or prescription abuse results in termination unless federal, state, or local laws conflict with this policy.

NOTE: Any combination of two treatment leaves may occur except that illegal drug abuse treatment may occur only once.

FUTURE PRESCRIPTION USE

Employees who have been treated for drug/substance abuse or alcohol or prescription abuse are required to contact the MRO prior to taking any prescribed controlled substances.

CONFIDENTIALITY AND RESTRICTED APPLICATION

All Information regarding an individual's health must be treated as confidential. Breach of this confidentiality may result in termination of employment. A corrected condition is not addressed as performance criteria provided attendance and/or any other performance-related criteria have been corrected.

STATE LAWS

When applicable federal, state, or local laws conflict with this policy (or federal law dictates otherwise), such laws are followed, and management and Personnel must consult with the Legal Department for advice.

EXCLUSIONS

This Policy does not prohibit consumption of alcoholic beverages at Company functions off Company property with the approval of management. However, participants are expected to exercise proper judgment and may be disciplined for improper behavior.

Further, this policy does not prohibit employees from transporting originally sealed alcoholic beverages in their luggage while traveling, nor does it prohibit the giving of alcoholic beverages as gifts. Possession of such gifts on Company premises is authorized as long as they remain sealed.

NOTE: It may be illegal to bring alcohol into some states where the state tax has not been paid.

EXCEPTIONS

All exceptions to this policy require the written approval of the chief executive officer (CEO).

RELATED PUBLICATIONS

* *Your Employee Benefits Book*
* *Federal Express Health and Safety Manual*
* *Flight Crewmembers Handbook*
* *Flight Operations Manual*
* *M & E Employee Handbook*
* *Ground Operations Policy & Procedure Manual (SERVICE 1)*
* *Flight Attendants Agreement & Flight Manual*

Table 2
Illegal Drug Abuse-Rehabilitation/Termination Criteria

	Medical coverage **	Type of Leave
FIRST DISCLOSURE	Normal medical coverage Short Term Disability (13 weeks maximum)	Medical Leave of Absence
SECOND DISCLOSURE	Terminated in accordance with the termination policy and ineligible for rehire upon voluntary disclosure or discovery	

** Refer to Your Employee Benefits book for details. Flight attendants should refer to their agreement. Flight crew members should refer to the Flight Crewmembers Handbook and Flight Operations Manual.

Placement Upon Return to Work	Required Continuing Care***	Testing Following Return
If position not safety sensitive, may return if position available. If position unavailable, governed by Medical Absence/Leave of Absence (Medical) policy. If position safely sensitive, placement governed by MRO.	1 year minimum	Periodic unannounced testing for remainder of employment

*** May be longer as required by Company, DOT or other government agency.

Table 3
Alcohol and Legitimate Prescription Abuse -
Rehabilitation/Termination Criteria

	Medical coverage **	Type of Leave
FIRST DISCLOSURE	Normal medical coverage to maximum allowed Short Term Disability (13 weeks maximum)	Medical Leave of Absence
SECOND DISCLOSURE	Normal medical coverage to remaining limit No Short Term Disability Benefits available	Unpaid Personal Leave of Absence (90 days maximum) Extension allowed only for certification procedure completion
THIRD DISCLOSURE	Terminated in accordance with the Termination policy and ineligible for rehire upon voluntary disclosure or discovery.	

** Refer to Your Employee Benefits book for details. Flight attendants should refer to their agreement. Flight crew members should refer to the Flight Crewmembers Handbook and Flight Operations Manual.

Table 3
Alcohol and Legitimate Prescription Abuse -
Rehabilitation/Termination Criteria

Placement Upon Return to Work	Required Continuing Care***	Testing Following Return
If position not safety sensitive, may return if position available. If position unavailable, governed by Medical Absence/Leave of Absence (Medical) policy. If position safely sensitive, placement governed by MRO.	1 year minimum	Periodic unannounced testing for remainder of employment

*** May be longer as required by Company, DOT or other government agency.

RELATED POLICIES

* Acceptable Conduct
* Department of Transportation Qualification/Driving Documentation
* Guaranteed Fair Treatment Procedure (Flight attendants see contract)
* Jumpseat
* Medical Absence/Leave of Absence (Medical)
* Nonrevenue Ground Vehicle Safety
* Revenue Ground Vehicle Safety
* Termination

OBSERVED POLICY VIOLATION PROCEDURE

EMPLOYEE (1) Fails to seek assistance.

MANAGEMENT (2) Becomes aware of employee's problem based on observed behavior or other documented information.

NOTE: When documented information referred to in step 2 is the result of a verified positive on any drug screen, management immediately performs step 11 of this procedure.

(3) Documents employee's behavior and basis for reasonable suspicion, and, if possible requests observation and documentation by another member of management.

(4) Contacts Personnel, Legal, and the Drug-Free Workplace Program Administration in Corporate Safety and Health Department.

NOTE: No test should be performed without the prior approval of the Legal Department

If management suspects use of alcohol by an employee and is unable to contact any of the departments listed above because of the schedule of operation, the manager may use another member of management as a witness

and request the employee to submit to a breathalyzer to determine alcohol use. Management is responsible for obtaining transportation from work to home for the employee.

In cases Involving suspicion of use of controlled substances, the employee should be suspended with pay until the departments listed above are notified. Management is responsible for obtaining transportation from work to home for the employee.

(5) Places employee on suspension with pay pending investigation.
(6) Conducts Investigation.
(7) When urine test is approved, arranges for urine collection by an assessment/referral facility approved by the Drug-Free Workplace Program Administration in Corporate Safety and Health Department medical review officer (MRO).
NOTE: Manager must ensure that all signed statements, pretesting approvals, etc. are obtained as outlined in the Fitness for Duty/Drug-Free Workplace policy.

ASSESSMENT REFERRAL FACILITY

(8) Performs collection.
NOTE: If in a DOT position, employee may also be required to pass the DOT physical examination.

MEDICAL REVIEW OFFICER (MRO)

(9) Monitors drug screen, consults with employee as needed, and notifies management.
(10) Notifies employee in the event of a positive screen.
NOTE: Employee has 72 hours to request that the split sample be tested by another certified

lab. The MRO arranges this testing.

MANAGEMENT (11) If employee tests negative, returns employee to work and complies with "Confidentiality/Restrictions" guideline of the policy.

(12) If employee tests positive, terminates employee in accordance with the termination policy.

VOLUNTARY DISCLOSURE/TREATMENT PROCEDURE

NOTE: Steps 1 through 20 apply to the first voluntary disclosure of abuse of an illegal or legal drug.
Steps 21 and 22 apply to the second use and voluntary disclosure of abuse of legal drugs, e.g., alcohol and legitimately prescribed drugs, after return from initial treatment

EMPLOYEE (1) Requests a manager's assistance in accessing People Help or directly seeks assistance through People Help and/or Managed Care Program.

(Flight attendants are handled in accordance with their agreement.)

NOTE: **Voluntary disclosure must precede any collection notification.**

BENEFITS (2) Notifies the Drug-Free Workplace Program Administration in Corporate Safety and Health Department/MRO when employee seeks benefits for substance abuse.

MANAGEMENT (3) Upon notification from employee or Benefits Department, contacts the Drug-Free Workplace Program Administration in Corporate Safety and Health Department/MRO and removes employee from job duties until outcome of professional evaluation and/or treatment.

(4) Offers assistance for professional help and refers employee to People Help.

(a) If employee is with Federal Express Group Health Plan, advises employee that in order to receive benefits, the employee must use Psych Managed Care Program.
(b) If employee is with Health Maintenance Organization (HMO), advises employee to contact HMO.
NOTE: HMO substance abuse coverage may differ regarding type of benefits offered, duration of treatment, etc. (Coverage for flight attendants is offered in accordance with their agreement.)

PEOPLE HELP/ CHEMICAL DEPENDENCY ASSESSMENT FACILITY

(5) Evaluates employee to determine if treatment is needed.

NOTE: If it is determined that treatment is not needed, management contacts the Drug-Free Workplace Program Administration in Corporate Safety and Health Department/MRO to arrange urine collection and DOT physical examination, if applicable. When negative results are reported, employee may return to work. This process should be completed within 5 working days.
(6) Provides professional evaluation of dependency and treatment plan to Disability Department/MRO.

MANAGEMENT

(7) Places employee on medical leave if treatment requires removal from job duties.
(8) Advises employee that after successfully completing treatment program and receiving MRO clearance, employee may return to work.
(9) Informs employee of need for testing before return to work and unannounced testing

	requirement upon return for remainder of employment. (10) Ensures employee signs Statement of Understanding for policy and future unannounced testing requirement, and retains letter in employee's file. (11) Sends copy of signed statement to the Drug-Free Workplace Program Administration in Corporate Safety and Health Department. (12) When applicable, obtains signed statement from employee giving permission to withdraw blood.
ASSESSMENT/ TREATMENT FACILITY	(13) Provides professional evaluation of dependency and treatment plan to Disability Department/MRO. (14) Performs treatment and/or testing. (15) Coordinates benefits, when applicable, with Group Health Administration Department.
MANAGEMENT	(16) Contacts MRO to initiate return to work and unannounced collection for testing requirement.
DRUG-FREE WORKPLACE PROGRAM	(17) Notifies employee's manager to set up unannounced collection for testing as required.
MEDICAL REVIEW OFFICER	(18) Provides assessment and consultation to Federal Express. **NOTE**: All employees in DOT-regulated (FAA/FHWA) positions must also pass the appropriate DOT physical examination. (19) If employee tests negative, returns employee to work and makes arrangements with the Drug-Free Workplace Program Administration in Corporate Safety and Health Department for unannounced periodic

collection for testing of employee for remainder of his employment at Federal Express.
(20) Honors confidentiality of health-related information.

MANAGEMENT

(21) Does not address a corrected condition as performance criteria provided attendance and/or any other performance-related criteria have been corrected
(22) If, after return to work from treatment, the employee begins abuse of an illegal drug and this use is discovered either through the employee's voluntary disclosure or through observation or testing, terminates employee. (See Table 2.)
(23) If, after return to work, the employee begins abuse of a legal drug (including prescription drugs or alcohol) and the employee voluntarily discloses such abuse, allows the employee to take an unpaid personal leave of absence for a second treatment for a maximum of 90 days. (See Table 3 and Alcohol/Prescription Abuse section of the Treatment and Disability Benefits Limitation guideline of the Fitness for Duty/Drug-Free Workplace policy.)
NOTE: An employee who returns to legal drug abuse after a second treatment is terminated and is ineligible for rehire.
(24) If, after return to work from treatment, the employee begins abuse of a legal drug and this abuse is discovered through observation or testing rather than by the employee's voluntary disclosure, terminates employee.

RANDOM TESTING PROCEDURE FOR CREW MEMBERS AND FLIGHT ATTENDANTS

DRUG-FREE

WORKPLACE PROGRAM ADMINISTRATION	(1) Provides list of names randomly selected by computer to flight management. (See Figure 3)
FLIGHT MANAGEMENT	(2) Checks schedule and selects time and place for pilot or flight attendant to be tested. (3) When the collection location is determined, informs duty officer or designee.
DUTY OFFICER OR DESIGNEE	(4) Requests Flight Control to radio selected employee after landing and to advise employee to report to duty officer or designee or to radio selected employees before landing and instruct them to report directly to the collection site for a random urine collection immediately upon arrival. (5) Informs selected employee of collection site location and asks employee to sign the "Random Notification" form. **NOTE**: If employee requests substance abuse treatment after testing notification and has verified positive urine drug screen (UDS), then employee is terminated.
EMPLOYEE	(6) Reports to collection site where collection is administered.
COLLECTION SITE	(7) Administers collection to selected employee. (See Figure 4.) **NOTE**: An employee who does not appear as notified for a scheduled collection for random or any other required testing (drug or alcohol) is terminated. (8) Ensures that sample s appropriate and that no tampering has occurred. **NOTE**: If there is evidence of tampering with sample, the collection process is repeated under direct observation and both the initial and observed samples are sent to the lab for testing.

If an employee is unable to void after a reasonable amount of time, the employee is required to drink 8 to 16 ounces of water every ½ hour for 4 hours or until the and of the employee's shift, whichever is smaller. In the case of a post accident or a reasonable cause testing, this time period can be extended up to 8 hours from the beginning of the collection procedure. If following the period of water intake, an employee is still unable to void, the employee is released and subject to an unannounced collection for testing in the near future.

An employee who is unable or unwilling to provide enough urine for the second bottle (split sample) is required to Initial the Chain of Custody form to accompany the first bottle/sample authorizing processing of the first bottle and indicating whether there is or is not a split sample to test in the event of a positive screen.

An employee who refuses to sign the Chain of Custody form or Initial the split sample statement on the Chain of Custody form is terminated.

(9) Delivers sample to designated lab.

(a) Has samples acquired in Memphis delivered by the laboratory's courier.

(b) Has field samples sent via Federal Express.

DESIGNATED LABORATORY

(10) Notifies medical review officer (MRO) of test results.

MEDICAL REVIEW OFFICER (MRO)

(11) When urine drug screen (UDS) is reported by lab as positive, informs employee and conducts investigation. (See Figure 5.)

(12) Informs employee that employee has 72 hours to request that the split sample be tested by another certified lab.

NOTE: When urine drug screen arrives at the designated lab, the DOT mandated sample is tested. The split sample is used for the employee

if additional testing is required for positive test. To test split sample, the request by the employee must be made to the MRO within 72 hours of notification of verified positive test.

MRO

(13) When sample is reported by lab as confirmed positive, notifies management to suspend employee with pay pending outcome of medical investigation.

(14) Reviews, investigates, and with employee's written request, tests split sample.

(15) Takes appropriate action per directives.

DRUG-FREE WORKPLACE PROGRAM ADMINISTRATION

(16) When informed of a "verified positive" test by the MRO, notifies appropriate Federal Express manager.

MANAGEMENT

(17) Suspends employee with pay and conducts an investigation. If verified positive results remain unexplained during the investigation, terminates employee. (Refer to step (1 2) above.)

EMPLOYEE

(18) May enter Guaranteed Fair Treatment Procedure (GFTP). (Flight attendants use their grievance procedure.)

NOTE: If at any time during the GFTP (or flight attendant's grievance procedure) the 'verified positive' results are explained to Federal Express's satisfaction, Federal Express assists employee with FAA/FHWA directives.

RANDOM TESTING PROCEDURE FOR ALL OTHER DOT-COVERED EMPLOYEES

NOTE: This procedure pertains to all DOT-covered employees except crew members and flight attendants who are selected from appropriate pool as described by federal regulations.

DRUG-FREE WORKPLACE PROGRAM ADMINISTRATION

(1) Provides list of names selected by computer to management. (See Figure 3.)

MANAGEMENT

(2) Informs selected employee in person when possible, or by phone when face-to-facecontactt is not practical. (Ensures Random Notification form has been provided)

NOTE: Management is responsible for promptly scheduling all required collection tests. Any exceptions should be coordinated in advance with the Drug-Free Workplace Program Administration in the Corporate Safety and Health Department.

EMPLOYEE

(3) Signs a Random Notification form

NOTE: The original is kept by the employee, one copy is given to the manager, one copy is kept by the collection site, and the fourth copy is forwarded by the collection site to the Drug-Free Workplace Program Administration.

(4) Reports to collection site where collection is administered. (See Figure 4.)

NOTE: An employee who does not appear as notified for a scheduled collection for random or any other required testing (drug or alcohol) is terminated.

COLLECTION SITE

(5) Forwards one copy of Random Notification form to Drug-Free Program Administration.

(6) Administers collection to selected employee.

(7) Ensures that sample is appropriate and that no tampering has occurred.

NOTE: If there is evidence of tampering with sample, collection process is repeated with direct observation and both the initial and observed samples are sent to the lab for testing.

If an employee is unable to void after a reasonable amount of time, the employee is required to drink 8 to 16 ounces of water every ½ hour for 4 hours or until the end of the employee's shift, whichever is smaller. In the case of a post accident or a reasonable cause testing, this time period can be extended up to 8 hours from the beginning of the collection procedure. If, following the period of water intake, an employee is still unable to void, the employee is released and subject to an unannounced collection for testing in the near future.

An employee who is unable or unwilling to provide enough urine for the second bottle (split sample) is required to initial the Chain of Custody form to accompany the first bottle/sample's processing acknowledging whether there is or is not a split sample to test in the event of a positive screen.

(8) Delivers sample to designated lab.

(a) Has samples acquired in Memphis delivered by laboratory's courier.

(b) Has field samples sent via Federal Express.

DESIGNATED LABORATORY

(9) Notifies medical review officer (MRO) of test results.

MEDICAL REVIEW OFFICER (MRO)

(10) When urine drug screen (UDS) is reported by lab as positive, suspends employee with pay and conducts investigation. (See Figure 5.)

(11) Also informs employee he has 72 hours to request split sample be tested by another certified lab.

NOTE: When urine drug screen arrives at the designated lab, the DOT-mandated sample is tested. The split sample is used for the employee if additional testing is required for positive test. To test split sample, request by the employee must be made to MRO within 72 hours of

notification of verified positive test.

The results of the split sample are reviewed by the MRO.

(12) Reviews, investigates, and, with employee's written authorization, tests split sample.
NOTE: If test (UDS) is positive but positive result is explained to MRO's satisfaction, the MRO reports a "negative test" to employee and the Company.
If positive result is not explained to the MRO's satisfaction, the MRO notifies Drug-Free Workplace Administration that test is "verified positive."

FAA/FHWA (13) Takes appropriate action per directives.

DRUG-FREE WORKPLACE PROGRAM ADMINISTRATION (14) When informed of a "verified positive" test by the MRO, notifies appropriate Federal Express manager.

MANAGEMENT (15) Suspends employee with pay and conducts an investigation. If "verified positive" results remain unexplained during investigation, terminates employee.

EMPLOYEE (18) May enter the Guaranteed Fair Treatment Procedure (GFTP). (Flight attendants use their grievance procedure.)

MANAGEMENT (17) Ensures that step 1 of the GFTP Investigation recommendations includes the concurrence of both the matrix Personnel Services managing director and Drug-Free Workplace Program management and consultation with the medical review officer (MRO) and a Labor and

Employment attorney in the Legal Department.

NOTE: If at any time during the GFTP the "verified positive" results are explained to Federal Express's satisfaction, Federal Express assists employee with FAA/FHWA directives.

Candidates are identified by certified random computer program

Other DOT-covered Employees	Pilots and Flight Attendants
Drug Free Workplace Program Administration gives list of randomly selected names to management	Drug-Free Workplace Program Administration gives list of randomly selected names to Flight Management.
Management informs employee (In person if possible; by phone if face-to-face not practical).	Flight Management checks schedule and selects time and place for individual pilot or flight attendant to be tested.
Employee signs notification form; manager keeps copy (If off-site, copy is sent to manager). Employee retains original	Flight Management informs duty officer or member of management at location
	Duty Officer informs Flight Control to radio pilot or flight attendant before or after landing.
	Flight Control radios employee to report to duty officer to designee for Notification of collection.
	Employee reports to duty officer or designee as Instructed.
Employee reports to Collection Site	Duty officer or designee informs employee of collection site location and has employee sign notification form.

NOTE: This flowchart provides only an overview of the process. Policy guidelines and procedures contain additional critical information that should be referenced.

Employee reports to collection site

An employee who is unable to void after a reasonable amount of time is required to drink water as outlined in the policy. If still unable to void employee is released and is subject to an unannounced collection in the near future.

Employee gives sample DOT required forms are filled out

An employee who is unable or unwilling to provide enough urine for split sample (second bottle) is required to initial the Chain of Custody form authorizing that bottle and indicating whether there Is or is not a split sample.

Sample is checked for proper temperature and volume

If there is evidence of sample tampering, collection process is repeated under direct observation.

Sample is sent to testing laboratory

Both initial and observed samples are sent for testing.

Field

MEM

Split samples are sent to designated lab via Federal Express.

Lab courier takes split samples to Designated lab.

Designated lab tests DOT-mandated sample.

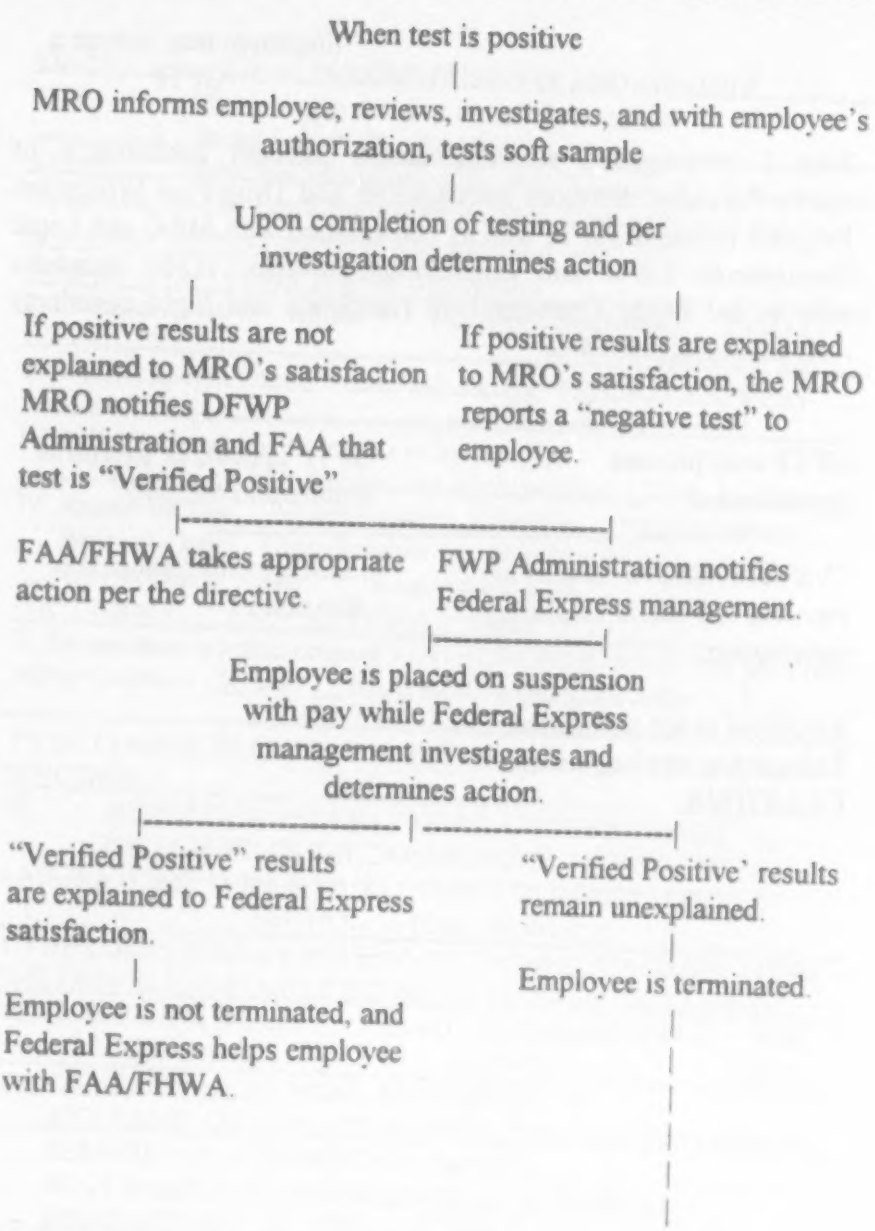
If test is positive, medical review officer (MRO) is notified.

If test is negative, the MRO is Notified.

MRO informs employee of investigation and that employee has 72 hours to request split sample be tested by another certified lab.

When test is positive, MRO notifies employee's manager to suspend employee with pay pending medical investigation.

NOTE: This flowchart provides only an overview of the process. Policy guidelines and procedures contain additional critical information that should be referenced.



NOTE: This flowchart provides only an overview of the process. Policy guidelines and procedures contain additional critical information that should be referenced.

Employee may initiate a GFTP

|

Step 1 investigation recommendation includes concurrence of merits Personnel Services management and Drug-Free Workplace Program management as well as consultation with MRO and Legal Departments Labor and Employment attorney. (Crew members refer to the Flight Crewmembers Handbook and flight attendants refer to their agreement).

|

|---------- ----------|

GFTP may proceed appeal board.

GFTP upholds or overturns termination decision.

|----------|

"Verified Positive" results are reported to Federal Express satisfaction.

Board upholds termination decision

|

Employee is not terminated. Federal Express helps with FAA/FHWA.

NOTE: This flowchart provides only an overview of the process. Policy guidelines and procedures contain additional critical information that should be referenced.

336-720 DRUG TESTING CUSTODY AND CONTROL

0349 Please ensure screened areas are completed

Social Security No. 563191495

12/01/92 Specimen Identification No. 097237

To be completed by Employee's Manger (If this is not completed at collaction site, Please call individual who scheduled collection)

Company Name Federal Express Corporation

I. A Manager's name Walker Manager's Employee # GOMAT 94DSO/SDLK

II. Medical Review Officer's name and address FEDERAL EXPRESS MRO

III. Indicate what drug specimen is to be tested for

x THC, Cocaine, PCP, Opiates, and amphetamines ___ Other, specify: ___

IV. Reason for Test __Pre-employment _x Random __ Periodic Medical __ Return to Duty __ Unemployment __ Transferred to newer position _ Post Accident __ Other ___ Reasonable Cause

DOT Agency __ FAA x FHWA Other

V. Temperature is within range of 37.9 - 37.7 C/90.9 - 99.0F Has been read within 4 minutes X yes __ No, If NOT record actual temp:_____

TO BE COMPLETED BY EMPLOYEE OR APPLICANT PROVIDING SPECIMEN

VI. ATTENTION: FEDERAL REGULATIONS PROHIBIT DISCLOSURE OF THE DONOR'S IDENTITY TO THE LABORATORY. DONOR MUST COMPLETE INFORMATION IN SECTION VI (Copy 3)ONLY.

TO BE COMPLETED BY PERSON COLLECTING SPECIMEN AFTER THE DONOR HAS COMPLETED SECTION VI-(See Cop) 3 of Form

VII. COLLECTOR NAME DATE OF COLLECTION TIME

ISI UNREADABLE 11/30/92 8:30

COLLECTION SITE NAME AND LOCATION

SITE NAME AND LOCATION UNREADABLE (NEED ORIGINAL

REMARKS CONCERNING COLLECTION _____

SPLIT SAMPLE IN ACCORDANCE WITH FEDERAL REGULATIONS X YES NO

I certify that the specimen observed on this form is the specimen presented to me by the donor providing certification on copy 3 of this form, that it bears the same identification number as that set forth above and it has been properly labeled and sealed in accordance with applicable federal requirements.

Signature of collector ISI unreadable Telephone No. Unreadable

336-720 DRUG TESTING CUSTODY AND CONTROL
0349 Please ensure screened areas are completed
Social Security No. 563191495
12/01/92 Specimen Identification No. 097237

TO BE INITIATED BY COLLECTOR AND COMPLETED AS NECESSARY THEREAFTER

VII. PURPOSE OF CHANGE RELEASED BY- Signature Print Name
Provide Specimen for testing DONOR - Do Not Sign

RECEIVED BY: Signature unreable DATE: 11/30/92

TO LAB UNREABLE UNREABLE 11/30/92

UNREABLE STAMP INFO TEMP STORAGE FRAN SAVELY
SPECIMEN VAULT 12/2/92

TO BE COMPLETED BY LABORATORY

IX. I certify that the specimen identified by the accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements and that the results set forth below .

LABORATORY Roche Biomedical Laboratories, 8387200349
1120 Stateline Road, Southaven, MS 38671

REMARKS

CHRIS COX /S/ Chris Cox Date: 12/3/92
(PRINT) Name (Last, First, Middle) Signature of Certifying Specialists

THE RESULTS FOR THE ABOVE IDENTIFIED SPECIMENARE IN ACCORDANCE WITH THE APPLICABLE SCREEING AND CONFIRMATION CUTOFF LEVELS ESTABLISHED BY THE HHS MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS (only on copies 1 and 2)

☐ Negative ☒ Postive, for the following ☐ Opiates

☐ Amphetamines ☐ Cannabis - THO ☐ Morphine

☐ Amphetamines ☒ Cocaine ☐ Codeine

☐ Methamphetamines ☐ Phencycloine ☐ _____

TO BE COMPLETED BY THE MEDICAL REVIEW OFFICER
MRO VERIFIED POSITIVE DRUG SCREEN

X. I have review the laboratory for the specimen identified by this form in accordance with applicable reporting requirements. My final determination/verification is: (Choose one) ☐ Negative ☒ Postive

Signature of Medical Review Officer: /S/ D unreadable
Date: 12/22/92 000261 EXHIBIT B-1

FEDERAL EXPRESS DRUG TESTING CUSTODY and CONTROL
Social Security No. 563-19-1495
Specimen Identification NO. 097237

PLEASE ENSURE SCREENED AREAS ARE COMPLETE

TO BE COMPLETED BY EMPLOYEES MANAGER (If this not completed at collection site, please call individual who scheduled collection.

I. EMPLOYER NAME FEDERAL EXPRESS CORPORATION

I.A MANAGER NAME |S| Unreadable Managers Employee Id. None COMAT Unreadable

II. MEDICAL REVIEW NAME AND ADDRESS
FEDERAL EXPRESS MRO

III. INDICATE WITH DRUGS SPECIMEN IS TO BE TESTED FOR:

☒ THC, Cocaine, PCP, Opiates, and Amphetamines Other _____

IV. REASON FOR TEST □ Pre-Employment ☒ Random □Periodic Medical □ Post Accident □ Reasonable Cause □ Return to Duty □ Other___
DOT AGENCY □ FAA ☒ FHWA □ OTHER _____

V. TEMPERATURE WITH RANGE OF 37.9 - 37.7 C/ 90.9 - 99.0 F Has been read with 4 minutes ☒ Yes □ No - If NOT, record actual time_____

TO BE COMPLETED BY EMPLOYEE OR APPLICANT PROVIDING SPECIMEN Read and complete - termination will result if employee refuses to sign or initial the Custody and Control form FedEx M-2033.

VI. NAME (Last, First, Middle) COMAT Night Phone Number
Carroll, Richard E. (415) 952-3025
DATE: 11/30/92

DONOR CERTIFICATION: I certify that I provided my urine specimen to the collector, that the specimen bottle(s) was placed into a temper-proof seal in my presence, I have initial each bottle and that the information provided on this form and on the label attached to the specimen bottle(s) is correct.
SIGNATURE: |S| Richard E. Carroll DATE: 11-30-92
Should the results for the laboratory test for the specimen identified in this form be confirmed positive, the Medical Review Officer will contact you to ask about prescription and over-the-counter medications you may have taken therefore, you may want to make a list of those medications as a "memory jogger." THIS LIST IS NOT NECESSARY. If you choose to make a list, do so on a separate piece of paper or on the back of your copy (Copy 3 Donor) on this form-DO NOT LIST ON ANY OTHER COPY OF THIS FORM. TAKE YOUR COPY WITH YOU.

FEDERAL EXPRESS DRUG TESTING CUSTODY and CONTROL
Social Security No. 563-19-1495
Specimen Identification NO. 097237
PLEASE ENSURE SCREENED AREAS ARE COMPLETE

TO BE COMPLETED BY PERSON COLLECTING SPECIMEN AFTER THE DONOR HAS COMPLETED SECTION VI (See Copy 3 of Form)

VII. COLLECTOR NAME PRINT (Last, First, Middle) Name is unreadable

DATE OF COLLECTION: 11/30/97 TIME OF COLLECTION 8:30

COLLECTION SITE/NAME AND LOCATION
Collection site name and location is unreadable on from provided by FedEx

REMARKS CONCERNING COLLECTION:

Split sample collected in accordance with applicable Federal Regulations
☒ Yes ☐ No

I certify that the specimen identified on this form is the specimen presented to me by the donor providing the certification on copy 3 of this form, that it bears the same identification number as that set forth above, and that it has been properly labeled and sealed in accordance with applicable Federal requirements.

SIGNATURE OF COLLECTOR: |S| Signature unreadable
TELEPHONE NUMBER: Telephone Number unreadable

TO BE INITIATED BY COLLECTOR AND COMPLETED AS NECESSARY THEREAFTER

VIII. PURPOSE OF CHANGE RELEASED BY -Signature - Print Name

Provide Specimen for testing -DONOR- (Donor - Do not sign in this block).

RECEIVED BY (Signature - Print Name) DATE:

|S| Signature unreadable 11/30/92

Other signatures and data on this line are unreadable 11/30/92

TO BE COMPLETED BY THE MEDICAL REVIEW OFFICER *MRO VERIFIED* POSITIVE DRUG SCREEN

X. I have review the laboratory for the specimen identified by this form in accordance with applicable reporting requirements. My final determination/verification is (Choose one) ☐ Negative ☒ Positive

Signature of Medical Review Officer: |S| D unreadable Date: 12/22/92

000031 EXHIBIT B

ERT IN ENVELOPE
the rest of the information contained on this form as furnished by FedEx is unreadable

6-720 Drug Testing Custody and Control

49- Specimen Identification NO. 097237

PLEASE ENSURE SCREENED AREAS ARE COMPLETED Split

/01/92 COMPLETED BY EMPLOYEES MANAGER (If this is not completed at collection site, please call individual who scheduled collection).

EMPLOYER NAME: FEDERAL EXPRESS CORPORATION

I.A MANAGER NAME MANAGER EMPLOYEE # GOMAT

ISI Walkel Unreadable

II. MEDICAL REVIEW OFFICER NAME AND ADDRESS

FEDERAL EXPRESS MRO

III. ☒ THC, Cocaine, PCP, Opiates, and Amphetamines Other _____

IV. REASON FOR TEST □ Pre-Employment ☒ Random □Periodic Medical □ Post Accident □ Reasonable Cause □ Return to Duty

□ Other_____ DOT AGENCY □ FAA ☒ FHWA □ OTHER _____

V. UNABLE TO REPRODUCE ITEMS ON EXHIBIT B-4 000052 DUE TO POOR QUALITY OF DOCUMENT PRODUCED BY FEDEX

TO BE COMPLETED BY PERSON COLLECTING SPECIMEN AFTER THE DONOR HAS COMPLETED SECTION VI (See Copy 3 of Form)

VII. COLLECTOR NAME - PRINT (first, middle, last) Date of Collection

ISI Unreadable signature 11/30/92

TIME OF COLLECTION: 8:30

COLLECTOR SITE/NAME AND LOCATION Unable to read correct site name and location due to poor quality of original.

REMARKS CONCERNING COLLECTOR

UNABLE TO REPRODUCE ITEMS ON THIS PORTION OF EXHIBIT DUE TO POOR QUALITY OF DOCUMENT PRODUCED BY FEDEX

VIII PURPOSE OF CHANGE RELEASED BY -Signature - Print Name

Provide Specimen for testing -DONOR- (Donor - Do not sign in this block).

RECEIVED BY (Signature - Print Name) DATE:

ISI Signature unreadable 11/30/92

Other signatures and data on this line are unreadable 11/30/92

TO BE COMPLETED BY LABORATORY

IX. I certify that the specimen identified by the accession number is the same specimen that bears the identification number set forth above, that the specimen has been examined upon receipt, handled and analyzed in accordance with applicable Federal requirements and that the results set forth below are for the specimen.

LABORATORY ADDRESS E5062632

EX097237

563-19-1495

OLCOC 12/12

6-720 Drug Testing Custody and Control

49- Specimen Identification NO. 097237

PLEASE ENSURE SCREENED AREAS ARE COMPLETED Split

REMARKS

PUTNAM JAN |S| JANET PUTNAM

Print Certifying Scientists Name (Last, First Middle) Signature of Certifying Scientist

Date: 12-14-92

THE RESULTS FOR THE ABOVE IDENTIFIED SPECIMEN ARE IN ACCORDANCE WITH THE APPLICABLE SCREENING AND CONFIRMATION CUTOFF LEVELS ESTABLISHED BY THE HHS MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS (only on copies 1 and 2)

☐ Negative ☒ Positive, for the following ☐ Opiates

☐ Amphetamines ☐ Cannabis - THO ☐ Morphine

☐ Amphetamines ☒ Cocaine ☐ Codeine

☐ Methamphetamine ☐ Phencycloine ☐ _____

TO BE COMPLETED BY THE MEDICAL REVIEW OFFICER

MRO VERIFIED POSITIVE DRUG SCREEN

X. I have review the laboratory for the specimen identified by this form in accordance with applicable reporting requirements. My final determination/verification is: (Choose one) ☐ Negative ☒ Positive

Signature of Medical Review Officer: |S| D unreadable

Date: 12/22/92

COPY 2A - SPLIT SPECIMEN ORIGINAL MUST ACCOMPANY SPLIT TO LABORATORY LABORATORY RETAINING

000052 EXHIBIT B-4

Mills-Pennisula
Hospital

Mills Hospital
100 South San Mateo Dr.
San Mateo CA 94401
415-696-4510

Medical Directors:
L.G. Taylor M.D. (Mills)
J.A. Buchard M.D. (Peninsula)

Penisula Hospital
1783 El Camino Real
Burlingham, CA 94010
415-696-5510

Medical Record # (000 2) 000-955-418
Age/dob/sex: 29 Yrs 09/01/63 M
Pin #: 1106-0134
Physicians: GLATT, MD, WILLIAM

Admit 12/09/92
Pt Type: 0

TOXICOLOGY SCREEN, URINE

12/09/92 1417 COCAINE None Detected
(Detection Limie: 0.3 mcg/mf)

Procedure:	pH	Spec. Gravity
Reference:	(5.0-7.5)	(1.005-1.030
12-09/92 WED 1417	6.5 f	1.020

Interpretative Data 000054 EXHIBIT C

f = Footnote Screening procedures should be considered presumptive and are not for forensic use. If confirmation of test result(s) is required, request must be submitted.

This part of exhibit unreadable (refer to original)

Patient: CARROLL, Richard
Med. Rec: (0002) 000-955-418

End of report.

PERSONAL DATA.

Employee Name:	Richard Carroll
Employee Number:	43480
Home Address:	3157 Shelter Creek
	San Bruno, CA 94066
Home Telephone No.	(415) 952-3023
Position/Location:	Courier / SOLA
	Phone Number: (415) 742-9965
Date of Hire:	12/5/84
Termination Date:	12/17/92
Operations Manager:	Carla M. Wynter
Date in Management:	9/1/91
Senior Manager:	Tammy Walker
Date in Position:	9/16/89
Date in Management:	3/1/88
Personnel Rep:	Beth Lee
Phone Number:	(415) 578-5122

LENGTH OF TIME EE REPORTED TO PRESENT MANAGER:
11/1/92 to 12/17/92

PERFORMANCE REVIEW RATING: (Require last three)

DATE	SCORE /	Overall Rating (Satisfactory, Ect.)
1. 6/92	6.6	Well Above Satisfactory
2. 12/92	6.6	Well Above Satisfactory
3. 6/91	6.9	Well Above Satisfactory

JOB HISTORY OF EMPLOYEE:

DATE FROM - TO:	TITLE OF POSITION:
08/28/88 - 12/17/92	Courier / Full-time
02/18/97 - 08/20/88	Courier-Hanlder / Full-time
12/28/86 - 02/17/87	Handler / Full-time
12/05/84 - 12/27/86	Handler / Part-time

REASON FOR COMPLAINT: **

Richard feels his guilt was determined prior to the results from the split sample.

PERSONAL DATA.

Employee Name: Richard Carroll

SUMMARY OF FACTS: **

On 11/30/92 Richard was submitted to a Random Drug Screen. On 12/08/92 Richard was notified by the MRO that his results were positive. Richard was then suspended with pay by Jeff Groux.

MANAGEMENT'S POSITION/RATIONALE: **

A person's employmeht is termenated in accordance with the Termination policy whenever an investigation confirms that the guidelines of the Fitness for Duty/Durg-Free Workplace policy have been violated.

DISCIPLINE HISTORY: PLEASE USE PAGE TWO.

** PLEASE USE ADDENDUM PAGES WHERE NECESSARY

FEDERAL
EXPRESS

2003 Corporate Avenue
Memphis TN 38132
901 369-3300
US Mail Box 727
Memphis TN 38194-1880

VIA FEDEX OVERNIGHT

December 18, 1992

Mr. Richard E. Carroll
3157 Shelter Creek Lane
San Bruno, CA 94066

Dear Mr. Carroll:

Your letter addressed to Mr. Frederick W. Smith was received today and forwarded to me for research and response on his behalf.

I have confirmed that, although you were terminated effective 12/17/97, you refused to report to the station to receive your termination letter until you received written notification to do so from your manager. Your meeting is scheduled for today.

Your letter to Mr. Smith indicated that you believe the Guaranteed Fair Treatment Procedure could take up to one year for resolution. That is not correct. Should you decide that your dismissal is unfair, you have the right to appeal that decision within 7 days of notification. According to policy, your appeal should be completed within 48 days assuming that all time frames are met and if you proceed to the last step. Should more time be necessary for investigations, you will be advised accordingly. An example of times when a GFTP could last longer is when an employee also files an internal EEO complaint; at which time, the GFTP would be deferred pending the outcome of the EEO investigation.

To further explain the policy, I have attached a copy of the GFTP policy P5-5 for your reference.

Regards,
/S/ Paola Q. High
Paola Q. High
Assistant to Frederick W. Smith 901/922/5250 pqh/FXER10/733
Attachment
c: Mr. Frederick W. Smith 000056 Exhibit E

5-5 GUARANTEED FAIR TREATMENT PROCEDURE

(Last Revised 15 Mar 90)

POLICY

Federal Express provides a fair and equitable procedure for handling employee complaints, problems, or concerns regarding fair treatment.

The policy affirms the employees' right to appeal any eligible issue through a process of systematic review by progressively higher levels of management. Though the outcome is not ensured to be in the employee's favor, his right to participate within the guidelines of the process is guaranteed.

SCOPE

All permanent full-time and part-time Federal Express employees (flight crew members must refer to the (*Flight Crewmembers Handbook*)

GUIDELINES

ELIGIBILITY

Any employee who receives discipline for any reason, including termination, or treatment that he believes to be unfair, is eligible to participate in the Guaranteed Fair Treatment Procedure (GFTP). Employees who submit a voluntary resignation from employment are not eligible to participate in the GFTP.

ELIGIBLE ISSUES

Issues eligible for consideration in the GFTP include the following:

* Promotions
* Application of compensation and benefit policies
* Disciplinary actions
* Performance reviews
* Actions that an employee believes to be unfair to him that are related to eligible issues

INELIGIBLE ISSUES

Issues not eligible for consideration in the GFTP are those seeking a change in the following:

* Hours of employment
* Compensation rates
* Content of benefit policies
* Content of Personnel policies and procedures
* Decision to suspend with pay pending further investigation

ENTERING THE GFTP

An employee who wishes to initiate a GFTP complaint is requested to hold an open and frank discussion with his immediate manager before entering the process.

An employee who wishes to use the GFTP to resolve a concern or problem that resulted from actions taken by a member of management in another division is requested to hold an open and frank discussion with that member of management before entering the process. That division's chain of command must be followed throughout the GFTP.

INITIATING A COMPLAINT

If the discussion is unsatisfactory, the employee must submit a written complaint to a member of management (manager, senior manager, or managing director within 7 days of the occurrence of the eligible issue and send a copy to his matrix Personnel representative.

STEPS IN THE PROCESS

The GFTP is a three-step process which requires specific actions to be performed by specific individuals within a designated time frame. The steps are identified in Table 1.

NOTE: During each step of the process, the employee must provide a copy of his complaint to his matrix Personnel representative.

APPEALS BOARD PARTICIPANTS

The Appeals Board consists of the chief executive officer (CEO), chief operating officer (COO), and chief personnel officer (CPO). In addition, two senior vice presidents serve on a rotating basis. Three members constitute a quorum.

BOARD OF REVIEW

The decision to initiate a Board of Review is within the total discretion of the senior vice president at step 2 or the Appeals Board at step 3. This is not a formal step in the appeal process, but is an option available to the senior vice president or the Appeals Board.

In cases involving employees licensed by the Federal Aviation Administration (FAA), the following guidelines must be followed. A Board of Review is appropriate if disciplinary action could result in loss of current position of an FAA-licensed employee; it is not appropriate where an FAA-licensed employee has admitted blatant willful, or intentional violation of Corporate policies or federal statutes subjecting the Company to loss of its operating certificates or damage claims for negligence in protecting the public safety had disciplinary measures not been undertaken.

A Board of Review also is not appropriate where management personnel (managers, senior managers, managing directors, and officers) are subjected to disciplinary action resulting from violations of leadership principles, management responsibilities, or the special trust and confidence reposed in the management ranks.

It an employee is granted a Board of Review and is not present for the Board of Review, the case is automatically forfeited unless it is rescheduled for extenuating circumstances by the Appeals Board. Management is also required to be present.

Table 1
Steps In guaranteed Fair Treatment Procedures*

Step	Participants Involved	Action Required
Step 1 - Management Review	-Complainant	-Submit written complaint to a member of management (manager, senior manager, or managing director) within 7 calendar days of occurrence of the eligible issue.
	-Manager, senior manager, and managing director	-Review all relevant information. -Hold a telephone conference and/or meeting with the complainant. -Make decision to either uphold, modify, or overturn management's decision. -Communicate their decision in writing to complainant and Personnel matrix NOTE: When multiple levels of management exist, a consensus decision is rendered. All of the above must occur within 10 calendar days of receipt of the complaint, unless written notice of time extension is provided the complainant and Personnel.
Step 2 - Officer Review	-Complainant	-Submits written complaint to an officer (vice president or senior vice president) of the division within 7 calendar days of step 1 decision. NOTE: In organizations in which a vice president or director reports directly to executive management, written complaints must be submitted to the senior vice president of Personnel.

Table 1
Steps In guaranteed Fair Treatment Procedures*

Step	Participants Involved	Action Required
Step 2 -	-Vice president and senior vice president	-Review all relevant information. -Conduct additional investigation, when necessary. -Make decision to either uphold, overturn, modify management's action, or initiate a Board Review. -Communicate their decision in writing to complainant with a copy to personnel matrix and the complainant's management NOTE: When multiple levels of management exist, a consensus decision is rendered. All of the above must occur within 10 calendar days of receipt of the complaint, unless written notice of time extension is provided the complainant and Personnel.
Step 3 - Executive Review	-Complainant	-Submits written complaint within 7 calendar days of step 2 decision to Employee Relations Department, which investigates and prepares case for Appeals Board review.
	-Appeals board	-Reviews all relevant information. -Makes decision to either uphold, overturn, or initiate a Board of Review, or take other appropriate action.

Table 1
Steps In guaranteed Fair Treatment Procedures*

Step	Participants Involved	Action Required
Step 3 -	Appeals Board	Note: All of the above must occur within 14 calendar days of receipt of the complaint, unless written notice of time extensions is provided the complainant and Personnel. Note: It may be necessary for the Appeals Board to adjust or recommend that lower management adjust the remedy already imposed upon an employee, including imposition of more severe or greater discipline in order to protect the Company, other employees, the general public, and the safety of our operation -Responds in writing to complaint within 3 calendar days of the decision with copy to personnel matrix and the complaint's chain of command.

During each of the process, the employee must provide a copy of his complaint to his matrix Personnel representative.

000271 EXHIBIT F-3

BOARD OF REVIEW PARTICIPANTS

When initiated, a Board of Review is composed of a chairperson (nonvoting), an Employee Relations representative (nonvoting), a representative of matrix Personnel (nonvoting), and a panel of five voting members. The complainant (must be present for Board of Review to be conducted), manager, and witness(es) are the other nonvoting participants in a Board of Review.

For more information on the Board of Review, contact the Employee Relations Department or the designated matrix Personnel representative.

FINAL DECISION

The decision of a Board of Review initiated at step 2 by a senior vice president may be appealed to the Appeals Board. However, the decision of a Board Review initiated at step 3 by the Appeals Board may not be appealed.

Since the Appeals Board is the last step in the GFTP, all of its decisions are final and binding on the employee.

MAINTAINING COMMUNICATION

It is the employee's responsibility to keep management and Employee Relations advised of any change in his address or telephone number to maintain communication throughout the GFTP.

COMPLAINTS ALLEGING DISCRIMINATION

If an employee alleges an issue of discrimination or an employee files a parallel Equal Employment Opportunity (EEO) complaint, the GFTP is suspended pending completion of an internal investigation by the EEO Department. Notification of complaints alleging discrimination must be made immediately to the Legal, EEO, and Personnel departments. Upon the conclusion of the internal EEO investigation, the GFTP may resume at the step the procedure was suspended.

PRIVILEGED AND CONFIDENTIAL COMMUNICATIONS/DOCUMENTS

To encourage candid, critical self-analysis in the GFTP, all analytical documents and investigation reports generated in the course of a GFTP,

including, without limitation, internal EEO investigations, must be confidential and subject to various legal privileges against disclosure. Circulation, distribution, or discussion of these documents is strictly limited to those who have a need to know their contents. Written or oral release of the contents of these documents beyond this limited circulation must be approved by the Legal Department,

THIRD PARTY REPRESENTATION

Attorneys are not permitted to serve as advocates on behalf of the Company or employees, nor to appear on behalf of employees or former employees or submit letters directly to the Company on behalf of employees or former employees in the GFTP. Attorneys or other such representatives are directed to contact the Legal Department. No third party is permitted to participate in any manner in the GFTP.

RELATED MANUAL

The *Board of Review Manual* (maintained by the Employee Relations Department)

RELATED POLICIES

* Acceptable Conduct
* EEO Complaint Investigation
* Open Door
* Performance improvement
* Revenue Ground Vehicle Accident Prevention
* Suggestion Awards Program
* Survey/Feedback/Action (SFA) Program
* Termination

HUMAN
RESOURCE
COMPLIANCE
KEEPING THE COMMITMENT

VIA FEDEX OVERNIGHT

March 9, 1993

Mr. Richard Carroll
3157 Shelter Creek
San Bruno, CA 94066

Dear Mr. Carroll:

The Appeals Board reconvened 3/2/93, at your request, to review the circumstances surrounding your termination on 12/18/92 for violation of the Fitness for Duty/Drug-Free Workplace.

After careful review of all the facts in this matter, it is the decision of the Board to uphold your management's actions.

The decision of the Appeals Board is final and binding on you and the Company.

For the Appeals Board,

ISI Gwendolyn Ruzan

Gwendolyn Rouzan, Manager
Employee Relations Department
PHONE: 901/922-5267
COMAT: 38194/MEM/TN/2440

TB/da/1003/ 1:FXERO5

c: F. Smith
T. Oliver
J. Perkins
B. Razzouk
M.A. Taylor
C. Wynter
M. Krinhop
M. Pigors
B. Lee

HUMAN
RESOURCE
COMPLIANCE
KEEPING THE COMMITMENT

VIA FEDEX OVERNIGHT

March 8, 1993

Mr. Richard Carroll
3157 Shelter Creek
San Bruno, CA 94066

Dear Mr. Carroll:

By the time you read this letter you will have already received the Appeals Board's response to your concern. You stated that the Foster City location was not the collection cite. However, as explained to you, field assessment centers consistently have been designating one central location for signature by the nurse. It is not to be interpreted as having been the actual collection cite.

The Appeals Board reviewed this administrative procedure and determined that your signature on the labels placed on your collection bottles verified the specimen as yours. Therefore, the issue you brought forward did not negate the actual collection, nor its findings.

I regret that your career ended in this manner. The Appeals Board's decision is final and binding. Thank you for expressing your concerns, and giving us an opportunity to respond.

Regards,
/S/ Paola Q. High
Paola Q. High
Assistant to Frederick H. Smith
Employee Relations Department
PHONE: (901) 922-5250

PQH/sr/164/FXERO9
c: Frederick H. Smith

000062 EXHIBIT H

VERIFICATION

I, Richard Carroll III, am the Petitioner/Plaintiff in this action. I have read the foregoing Petitioner and Complaint and know the contents thereof. All facts alleged in the above Petition and Complaint are true of my own personal knowledge. I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this document was executed by me on October 29, 1993, at San Francisco, California.

|S| Richard Carroll III
RICHARD CARROLL III
PETITIONER/PLAINTIFF

carroll/complaint

(2)

Supreme Court, U.S.
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No. 97-657

In The

Supreme Court of the United States

October Term, 1997

RICHARD CARROLL,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Federal Express Corporation respectfully submits that the actual issues presented by the Petition for a Writ of Certiorari of Richard Carroll are as follows:

1. Whether Carroll may, for the first time in his Petition, raise the argument that federal instead of California state law governs his claim.

2. Whether, as a matter of law, a *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), action may be maintained against Federal Express as a corporate entity or whether such an action is limited to individual defendants.

3. Whether, as a matter of law, Federal Express can be deemed a "federal actor" in terminating Petitioner's employment as required to invoke the substantive due process protections of the Fifth Amendment of the United States Constitution.

4. Whether the procedural due process requirements of the Fifth Amendment are coextensive with Department of Transportation Regulations concerning mandatory drug testing and, if so, whether Carroll can possibly establish any violation of those Regulations under the circumstances.

5. Whether an employee subject to Department of Transportation Regulations who fails a mandatory drug test is entitled to a jury trial whenever he or she asserts an unsupported denial of actual drug use.

6. Whether Petitioner can establish any violation of his due process rights after certifying in writing that the chain of custody procedure at issue in his drug test had been properly handled.

7. Assuming a uniform federal rule is required regarding delegation of obligations under the Department of Transportation Regulations, whether employers should be held vicariously responsible for the actions of independent contractors who conduct the actual collections or whether employers may satisfy their obligations by establishing adequate procedures and retaining qualified independent contractors.

Federal Express respectfully requests that this Court deny Carroll's Petition for a Writ of Certiorari to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on May 6, 1997.

LIST OF PARTIES AND CORPORATE AFFILIATES

Respondent Federal Express Corporation, a publicly held Delaware corporation, has no parent company and no nonwholly owned direct subsidiaries.

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OPINIONS BELOW

The opinion (Appendix to Petition, ("App.") A2-A9) of the Court of Appeals for the Ninth Circuit, No. 95-16603, is reported at 113 F.3d 163. The District Court's order granting Respondent's motion for summary judgment (App. B1-B16) and the District Court's entry of judgment of dismissal with prejudice (App. B17) were unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals' decision affirming the District Court's entry of summary judgment for Respondent was entered on May 6, 1997. The jurisdiction of this Court to review the Ninth Circuit Court of Appeals' judgment was invoked by Petitioner under 28 U.S.C. § 1254(1).

REGULATIONS AT ISSUE

This case involves 49 Code of Federal Regulations ("C.F.R.") §§ 40.1, *et seq.* and §§ 391.71, *et seq.* (the "Regulations").

STATEMENT OF THE CASE

In an attempt to induce this Court to grant certiorari, Petitioner Richard Carroll has sought to characterize this case as having great significance for the continued viability and proper enforcement of mandatory federal drug testing schemes and the protection of individual due process rights. This is wholly inaccurate.

Carroll was fired by Respondent Federal Express Corporation after testing positive for use of cocaine, a dangerous, illegal drug which could have adversely affected his ability to drive his delivery van. The public policy interest in avoiding such unacceptable risk of death, injury and destruction of property is well established. One crucial fact is undisputed and undeniable: *Carroll certified in writing at the time of the collection of his urine sample that all requisite chain of custody procedures had been complied with.* Once his sample proved positive, however, Carroll then claimed that his prior certification was false and, because he had "never used drugs," the sample "must have" been switched or tampered with. Carroll submitted no competent or material evidence to show any error in

the drug collection process, chain of custody or testing procedure imposed by the DOT Regulations and adopted in Federal Express' own internal guidelines. Carroll's "evidence" in support of this claim amounts to no more than his biased verbal denial of drug use, and a personal physician's allegedly negative drug test, taken several days later and not under DOT-specified, controlled conditions.[1]

There is no need to grant certiorari in this case. Carroll improperly asserts, for the first time in his Petition, that federal rather than California law must govern Federal Express' duties to him. Carroll himself briefed and argued California law in both lower courts. Even if addressed on the merits, Carroll asks for an unmanageable and unrealistic "uniform federal law" holding employers strictly liable for non-compliance with the DOT Regulations. Carroll's proposed rule, as applied here, would allow every terminated employee a jury trial seeking damages (including punitives), without any actual or competent evidence of tampering, simply by swearing he or she never used drugs. This would eviscerate the mandatory drug testing programs designed to secure public safety and literally make the federal courts the ultimate arbiter of the accuracy of every positive drug test.

The DOT Regulations expressly permit employers to use independent urine sample collection and testing services. Federal Express therefore established drug testing procedures in full compliance with the DOT Regulations, hired a qualified, independent provider of collection services, and required that the provider comply with the Regulations. There is no claim that the provider was unqualified or that Federal Express' procedures were inadequate, just that Carroll's specific test was flawed. No far-reaching due process concerns are raised. *Carroll certified that the chain of custody procedure was properly followed.* If any deviation in proper chain of custody procedures occurred, it is

1. Federal Express told Carroll his private test was not valid and could not refute the official positive test sample as the delay between the two tests would have been sufficient to avoid detection of cocaine ingested prior to the positive test sample being provided. Moreover, Carroll's private test was invalid because it was not conducted under DOT-imposed, controlled conditions.

because Carroll failed to avail himself of the available protections. There is no claim of undue influence or coercion on the part of the collection service, or that Carroll was uninformed of the nature of the testing process or the serious consequences of a positive test result.

Carroll argues that absent his proposed uniform federal rule, "employers throughout this country" will disregard the drug testing requirements. To the contrary, all affected employers, including Federal Express, have tremendous incentive to comply with DOT-mandated testing procedures to avoid DOT enforcement action. Imposition of a "non-delegable duty" on employers is not necessary to ensure proper implementation of drug testing programs. There is *no evidence* in the record that Federal Express disregarded the Regulations or was itself involved in any wrongful conduct. Federal Express' business is air and express transportation not drug testing. There is no reasonable basis, or need, to expose Federal Express to liability under these circumstances. The Ninth Circuit was correct that an employer can discharge its duties under the Regulations in two ways: administer its own program or hire licensed outside services. *Carroll v. Federal Express*, 113 F.3d 163, n.2 (9th Cir. 1997). Carroll was free to sue the independent contractor for negligence, or the contractor's individual employees under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 308 (1971) but elected not to do so. As the Ninth Circuit correctly concluded: "Carroll may have a cause of action, but it does not lie against Federal Express." *Carroll, supra*, at 166.

Carroll's Petition states for the first time that his due process claim is premised on *Bivens*. In fact, Carroll never even mentioned *Bivens* in any submission to the District Court or the Ninth Circuit. Certiorari is inappropriate because Carroll's claim, as he now asserts it, fails as a matter of law for several reasons:

- a *Bivens* action may only properly be maintained against individuals, not corporate entities such as Federal Express. Carroll never sued the individual(s) who he claims violated his rights.

- Carroll's substantive due process claim cannot succeed because Federal Express cannot be considered a "federal" or "governmental actor" in terminating Carroll's employment, *as termination was not required by the DOT Regulations or any federal law*, but instead Federal Express' own private policies.

- Carroll's procedural due process claim incorrectly assumes that due process requires unwavering application of the DOT Regulations. Due process is a flexible concept depending on the particular situation. Carroll received fair warning, fair disclosure and fair opportunity to protect the integrity of his sample. Federal Express' procedures were in full compliance with the DOT Regulations.

The Ninth Circuit Court of Appeals properly affirmed the District Court's entry of summary judgment. Carroll's Petition should be rejected.

FACTUAL BACKGROUND

The Petition arises from an entry of summary judgment in favor of Respondent Federal Express and against Carroll, a former Federal Express employee. Applying its own employment policy, Federal Express terminated Carroll's employment as a courier after Carroll failed a random drug test. Carroll was required to take the test pursuant to United States Department of Transportation ("DOT") regulations found at 49 C.F.R. §§ 40, *et seq.* and §§ 391.81, *et seq.* (the "Regulations") and Federal Express' internal policies. (Excerpt of Record ("ER") 000003-000004.) Carroll tested positive for usage of an illegal drug, cocaine. (ER 000051, 000052.)

Federal Express is an international, air and express carrier with operations in all 50 states and abroad. Federal Express employs thousands of transportation personnel who operate jet aircraft, interstate trucks, local motor vans and other vehicles. DOT-couriers, such as Carroll, are subject to random drug testing.

(ER 000003-000004.) Pursuant to the Regulations, Federal Express was required to adopt a documented procedure for the collection, shipment and analysis of drug test samples from its transportation workers. 49 C.F.R. §§ 40.1; 391.83; 391.87; 391.93. Federal Express complied with the Regulations and established its own "Fitness for Duty/Drug-Free Workplace" policy (the "Policy") which provided testing guidelines and implemented a random drug test program. Federal Express' Policy made termination mandatory for an employee who tested positive for illegal drugs as a result of a random test. (ER 000025-000048, 000387-000436, 000549-000581.) In all other respects, Federal Express' drug testing guidelines mirror the provisions and requirements of the Regulations. (ER 000610.)

The Policy provided that its purpose was to protect public safety and the safety of co-workers: "Transportation employees who abuse drugs pose a particularly menacing safety threat to their co-workers and the public." (ER 000422.) Federal Express provided a written copy of the Policy to all affected transportation personnel, including Carroll, explaining in detail the purpose and implementation of the Policy. (ER 000464.) Among other things, the materials provided explained: how the collection process worked (ER 000393); that the tested employee would "witness the sealing and labeling of each specimen for shipping" (ER 000394); how the chain of custody process worked and how the security of the entire collection, shipping and testing process would be ensured. (ER 000396.) Moreover, Federal Express informed its employees, including Carroll, that they would be "asked to print your social security number and initials on the [specimen] container label and sign a form stating you watched the container being sealed." (ER 000418.) Carroll admits he received such information from Federal Express. (ER 000464.)

Carroll and his fellow Federal Express employees were expressly warned that "[i]f, after careful and extensive medical review, a test is verified positive, employment status with Federal Express is determined by management and personnel services and may result in termination." (ER 000028, 000421.) The Policy also specifically stated "[a]n individual's employment is terminated . . .

whenever an investigation confirms [the Policy] has been violated." (ER 000028.) One identified violation was "[a] verified positive drug screen [which] indicates drug(s) in [an] employee's system." (ER 000028.) Federal Express also instructed employees on how to appeal the results of a termination due to positive drug test through Federal Express' internal Guaranteed Fair Treatment Procedure ("GFTP"), including the presentation of appropriate evidence of innocence. (ER 000400.)

In order to implement a random testing program, Federal Express contracted with Options and Choices ("OAC"), an independent health services provider, to handle all aspects of the drug sample collection and chain of custody documentation. (ER 000292, 000293, 000294, 000298, 000305, 000332, 000480.) Federal Express relied on OAC's qualifications in assigning all collection responsibilities, and there is no claim or evidence OAC was not qualified or competent. (ER 000331.) Federal Express had no involvement in the actual collection or testing of samples collected from its workers. (ER 000331.) The actual analysis of all test samples was performed by two independent medical laboratories. (ER 000516, 000494, 000478.)

Federal Express provided OAC with its own Policy and the Regulations and instructed OAC to follow and comply with all of the provisions contained therein. (ER 000482-000483, 000489-000490, 000491, 000492, 000526.) In addition, Federal Express periodically audited OAC's collection sites to ensure proper sample collection and shipping procedures, and compliance with the Regulations. (ER 000475, 000485, 000520.) The nurse who collected Carroll's sample on the occasion at issue here was audited by Federal Express. (ER 000486, 000487, 000488, 000520, 000521, 000523, 000524.)

In accordance with its Policy and the Regulations, Federal Express randomly selected Carroll for a drug test and directed him to report to the sample collection facility in South San Francisco, California, on November 30, 1992. (ER 000437.) Carolyn West, a registered nurse employed by OAC, performed the actual collection of Carroll's drug test sample. (ER 000364.) In particular, West

instructed Petitioner on donating a urine sample, completion of related paperwork and handling of the chain of custody procedure. (ER 000366, 000367, 000368.)

Carroll testified in his deposition that he was asked to sign the chain of custody forms and the tamper-proof labels for his specimens before actually producing his sample and before West placed the identifying, tamper-proof seals and labels on his sample containers. (ER 000367-000368.)[2] West testified that, with respect to Carroll's sample collection procedure, she had no recollection of deviating from her customary sample collection and processing procedure — which included having the Federal Express employee sign the subject labels in her presence and watch her affix the labels to the specimen containers after donating the urine sample. (ER 000534-000540.) She acknowledged that she "may" have allowed a different Federal Express employee to complete the labels before going to the bathroom on one prior occasion (ER 000543-000544), but she had no recollection of Carroll signing his labels prior to her placing the labels on Carroll's specimen bottles or any other aspect of Mr. Carroll's sample collection (ER 000528-000535.)

Carroll did not object to any aspect of the sample collection or chain of custody procedure as conducted by West at the time he produced his sample. To the contrary, during the sample collection procedure, and consistent with West's testimony, Carroll signed and dated a chain of custody form which accompanied his specimen and provided:

> DONOR CERTIFICATION
>
> I certify that I provided my urine specimen to the collector, that the ***specimen bottle(s) was sealed with a tamper proof seal in my presence. I have initialed each bottle and that the information***

2. For some unexplained reason, Carroll has suddenly elevated West's conduct to "intentional" deprivation of his rights. (Petition, p. 4.) Carroll's previous allegations of West's conduct did not make this assertion. (*See* Carroll's Opening Brief to the Ninth Circuit, p. 7.)

provided on this form and on the label affixed to the specimen bottle(s) is correct.

(ER 000282, Respondent's Appendix A) (emphasis added.)

Following completion of the collection procedure, West caused specimens to be shipped in their tamper-proof containers to an independent testing laboratory. (ER 000527, 000531.) Carroll's sample was chemically analyzed and verified as positive for cocaine. (ER 000282, 000283, App. E69-E73.) Carroll was notified of the positive test result and requested that his "split sample" also be tested for verification purposes. (ER 000216-000217.)[3] The "split sample" also tested positive. (ER 000217.) Subsequently, and in accordance with Federal Express' Policy, Carroll was terminated from his job as a DOT certified van driver. (ER 000217-000218, 000268, 000273, 000274.)

Petitioner appealed his dismissal through Federal Express' Guaranteed Fair Treatment Procedure ("GFTP"), a multi-stage administrative review procedure conducted by senior Federal Express management which provides any disciplined, aggrieved or terminated Federal Express worker with the right to a review and the right to present evidence on his or her behalf. (ER 000218-000219, 000268-000274, 000381.) During his GFTP review, Carroll, for the first time, presented objections to the way his drug test sample had been collected. Specifically, Carroll claimed that he had been asked to fill out the chain of custody forms and specimen bottle labels for his test before donating his urine sample. He also asserted that he had not observed the OAC nurse fill out the forms, affix the labels and seal the sample bags in his presence. (ER 000267, 000268, 000273, 000274, 000367, 000368, 000370, 000371, 000372.) In addition, Carroll proffered his own drug test report, based on a drug test performed by his

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3. In the "split sample" test method, the test subject's sample is divided into two separate specimen containers. In the event the first sample tests positive, the second "split sample" is independently tested for verification purposes. (ER 000406-000407.)

personal physician approximately eight days after the "official" DOT test. (ER 000266, 000267, App. E74.) Carroll's private test purported to be negative. (ER 000266, App. E74.)

Carroll's evidence was considered and rejected by the GFTP Appeals Board. (ER 000438, App. E83.) The Appeals Board informed Carroll that his verbal claim of improper collection and chain of custody procedures was not credible in light of his written certification at the time of the sample collection that proper procedure had been followed. (ER 000274, 000383.) The Appeals Board rejected Carroll's own private drug test, noting that the passage of time following the original test, combined with Carroll's possible voluntary abstention from cocaine usage, could have eliminated any possibility of detection of cocaine ingested before the first test. (ER 000379.) Lastly, the Appeals Board rejected Carroll's objection that the collection site listed on the chain of custody form, *i.e.* Foster City, was not the site at which the sample had actually been collected. The review officer explained that the Foster City location was routinely listed on the forms because field assessment centers consistently designated one central location for signature by the nurse handling the collection procedure and that this location was not to be construed as the actual collection site. (ER 000274, 000375.) Based on these findings by the review Board, Carroll's appeal was denied and his termination was upheld. (ER 000273, 000274, App. E84.)

PROCEDURAL BACKGROUND

Following the final rejection of his appeal by the GFTP Appeals Board, Carroll filed suit only against Federal Express (not OAC or West) on October 29, 1993 in the San Mateo Superior Court in California. Carroll initially asserted nine claims for relief. (ER 000001-000024, App. E1-E29.) Federal Express removed the case to the District Court for the Northern District of California, and filed a motion to dismiss pursuant to FRCP 12(b)(6). The resulting order limited Carroll's complaint to three claims for relief: violation of his Fifth Amendment due process rights; breach of implied employment contract; and breach of the implied covenant of good faith and fair dealing implied in the alleged employment contract. (ER 000158-000172, App. C1-C18.)

After completion of discovery, Federal Express brought a motion for summary judgment which the District Court granted. The District Court ruled that Federal Express could not be held liable for any alleged acts or omissions of the independent contractor OAC, and that Federal Express did not owe a "non-delegable duty" to Carroll for OAC's alleged violations of the Regulations. On August 15, 1995, the District Court entered final judgment for Federal Express. (App. B1-B16; B17.)

Petitioner filed his Notice of Appeal of the District Court's entry of summary judgment to the Ninth Circuit Court of Appeal on August 17, 1996. (ER 000621.) After briefing of the issues and oral argument by Carroll and Federal Express, the Ninth Circuit affirmed the District Court's entry of summary judgment on May 6, 1997.

REASONS FOR DENYING THE WRIT

I. CARROLL IMPROPERLY SEEKS FOR THE FIRST TIME IN HIS PETITION TO RAISE HIS ARGUMENTS THAT "FEDERAL" LAW GOVERNS AND THAT HE HAS STATED A *BIVENS* CLAIM.

Generally, this Court will not decide a question not raised in the lower courts absent exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from federal courts that questions not pressed or passed upon below are reviewed.") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Carroll asks the Court to decide

> [W]hether federal law or the law of the state of the forum applies to construction of the Fifth Amendment to the United States Constitution, in determining the rights of a tested employee to due process under the Fifth Amendment.

(Petition at page 1, question 4.)

Carroll previously failed to raise this issue. In fact, Carroll argued California law at both the District Court and Ninth Circuit

levels. (ER 000001-000024, 000104-000135, ER 000332- 000345, Petitioner's Opening and Reply Briefs to Ninth Circuit.) Until he filed his Petition, Carroll never once made a reference to creating a uniform federal rule governing the application and administration of federal drug test schemes or to *Bivens, supra*, 403 U.S. 308. This Court should not grant certiorari to consider issues raised by Carroll for the first time at this stage of his lawsuit.

Understandably, the Ninth Circuit noted that the legal basis of Carroll's procedural due process claim was ambiguous and could be interpreted as either a claim under 42 U.S.C. § 1983 for violation of Carroll's civil rights or as a claim under California law for termination in violation of public policy.[4] *Carroll, supra*, 113 F.3d 165, n.1. Although Carroll chides the Ninth Circuit for its analysis (Petition, p. 6), any confusion is attributable to Carroll's failure to provide any clear, meaningful explanation of the basis for his claim. He has sent "mixed signals" throughout this case. For example, in his Petition, at p. 6, Carroll argues: "Since Section 1983 applies only to state actors, not federal actors, Carroll's claim is clearly not brought under Section 1983." But, in his Opening Brief to the Ninth Circuit, Carroll argued: "Defendant (which for purposes of the random drug test performed on Mr. Carroll, is a '*state actor*' or 'agent of the government'. . . ." (Emphasis added.) (Appellant's Opening Brief to Ninth Circuit, p. 17.) Moreover, Carroll argued extensively based on California law to both the District Court and Ninth Circuit. (ER 000332-000345, Petitioner's Briefs to the Ninth Circuit.) The Ninth Circuit cannot be faulted for not reading Carroll's mind or developing the theory of his case he now reveals in his Petition for the first time. The Ninth Circuit properly determined that Federal Express could not be held vicariously liable for OAC's actions under California law and this Court should not permit Carroll reconsideration based on new theories.

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4. California recognizes a tort claim for termination of an employee in violation of public policy. *See, e.g., TRW, Inc. v. Superior Court of Los Angeles County*, 25 Cal. App. 4th 1834 (1994), *cert. denied*, 513 U.S. 1151 (1995).

II. EVEN IF CARROLL'S *BIVENS* CLAIM IS CONSIDERED PROPERLY RAISED, IT IS WITHOUT BASIS AS A MATTER OF LAW.

A. *Bivens* Actions Cannot Be Maintained Against Corporations Such As Federal Express, But Are Only Properly Brought Against Individuals.

In *Bivens, supra*, 403 U.S. 308, this Court considered whether an individual could state a cause of action under the Fourth Amendment for injuries against *individual* narcotics agents for an alleged violation of that person's privacy rights. According to the petitioner in *Bivens*, the narcotics agents conducted a warrantless search of his apartment, employed unreasonable force and arrested him for alleged drug violations without probable cause. Petitioner filed a complaint in federal court against the individual agents seeking damages.

The narcotics agents argued that the rights asserted by petitioner were state-created rights of privacy and, therefore, petitioner had no federal claim for an alleged unconstitutional invasion of his rights. Rather, they argued, petitioner could obtain monetary damages only by an action in tort under state law in the state courts. *Bivens, supra*, 403 U.S. at 390. This Court held the petitioner could state a federal cause of action against *the individual federal agents* and was entitled to recover monetary damages for any injuries suffered as a result of the agents' violation of his Fourth Amendment Rights. *Id.* at 397. *Bivens* suits have subsequently been recognized under other constitutional amendments, including the Fifth Amendment. *See, e.g., Davis v. Passman*, 442 U.S. 228 (1979) (suit against congressman by former employee). Although *Bivens* permits actions for violation of the Fifth Amendment's Due Process Clause, a *Bivens* action may only be asserted against individual federal actors who commit a constitutional violation.

In *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994), Meyer sought damages for the alleged violation of his right to due process after the termination of his employment as a senior officer of Fidelity Savings and Loan

Association. He asserted a *Bivens* claim against the FSLIC as an entity. The issue before the Supreme Court was whether a cause of action could be brought against an agency of the federal government. Finding that the reasoning behind *Bivens* did not support such an extension, the Court confirmed that a *Bivens* action can only be maintained against an *individual* federal officer or officers. *Id.* at 473. "[T]he purpose of *Bivens* is to deter the officer." *Id.* at 485 (citing *Carlson v. Green*, 446 U.S. 14, 21 (1980)). In rejecting Meyer's attempt to expand the scope of *Bivens* actions, the Court concluded, "Meyer brought precisely the claim that the logic of *Bivens* supports — a *Bivens* claim for damages against Patullo, *the FSLIC employee who terminated him.*" *Id.* (Emphasis added.)

Carroll does not cite a single case extending *Bivens* to claims against a corporation such as Federal Express.[5] Instead, those cases Carroll relies on show he has misdirected his lawsuit. Citing *Carlson v. Green*, 446 U.S. 14 (1980),[6] Carroll carefully words his assertion:

> [I]t has long been obvious to this Court (as it should have been to the Ninth Circuit) that the liability of *federal actors* for violations of citizens' constitutional rights should be governed by uniform federal rules, not by the law of the forum.

(Petition at p. 7, citing *Carlson, id.* at 23) (emphasis added).

However, the referenced passage in *Carlson* actually provides: "Yet it is obvious that the liability of *federal officials* for violations of citizens' constitutional rights should be governed by uniform rules." (Emphasis added.) This is a critical distinction. Carroll has failed to state a valid *Bivens* action in that he sued none of the individual actors who allegedly

5. Nor did Federal Express' research of cases decided after *Meyer* reflect any recognized claim under *Bivens* other than against individual actors.

6. In *Carlson*, the defendant was the Director of Federal Bureau of Prisons, an individual.

mishandled his drug test sample. Instead, he only brought his claim against Federal Express in its capacity as a corporate entity. The Ninth Circuit properly held that Carroll may have had a cause of action, but it did not lie against Federal Express. *Carroll, supra* at 166.

B. Carroll Cannot Establish That Federal Express Was A "Federal Actor" As Required For His Substantive Due Process Claim Under *Bivens*.

Even if it were a proper defendant, Federal Express is a private actor, and its conduct is not subject to the Fifth Amendment unless Carroll can demonstrate such conduct constituted federal governmental action. *See Fidelity Financial Corp. v. Fed. Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). This Court has held that merely because a business such as Federal Express is subject to extensive regulation does not establish that its actions are subject to the Fifth Amendment. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). In *Jackson*, this Court explained

> [T]he inquiry must be whether there is a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself.

Jackson, id. at 351 (emphasis added).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court similarly analyzed the state action requirement of the Fourteenth Amendment, holding that a state is responsible for a private action only when that state has exercised coercive power or significant encouragement of the action, or when the private entity exercised powers traditionally exclusively the province of the government. *Blum, id.* at 1004-05.

Carroll describes his Fifth Amendment based claims as follows:

> Mr. Carroll seeks to vindicate his Fifth Amendment rights (ER 000012-000013) to procedural due process

> regarding the manner in which his drug test sample was collected in violation of the DOT Regulations, *and his substantive due process rights regarding Respondent's wrongful termination of his employment.*

(Petition, pp. 6-7) (emphasis added.)

The "challenged action" upon which Carroll's substantive due process claim is premised is Federal Express' termination of his employment. Yet, the DOT Regulations *did not* require Carroll's termination, merely that he not drive or perform "safety sensitive" duties. *See, e.g.*, 49 C.F.R. § 382.213 (driver cannot report for duty or remain on duty requiring performance of "safety-sensitive functions" if driver uses controlled substance); 49 C.F.R. § 382.501 (driver cannot perform safety-sensitive functions if driver violates alcohol or controlled substances prohibitions); and 49 C.F.R. § 391.95 (person who tests positive not be permitted to operate commercial motor vehicle or be on duty as a driver). Federal Express *did not* terminate Carroll pursuant to the Regulations; it is undisputed Federal Express did so under its own self-established employment Policy. (ER 000061; Petition, p. 16.) Although Federal Express' role in *testing* pursuant to the DOT Regulations may establish "governmental action,"[7] it did not in fact participate in the allegedly improper chain of custody documentation Carroll complains of. Federal Express' established procedures did not cause Carroll harm. Most importantly, Carroll cannot possibly establish Federal Express engaged in any "governmental action" in firing him.

Carroll cites *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), in support of the argument that his termination was a violation of his right to substantive due process. Carroll describes the holding in *Rendell-Baker* as "private party's termination of employee *under compulsion of law* is an action under color of law." (Petition, p. 15,

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7. *See Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 615-616 (1989) (holding that federally imposed random drug testing by railroads was "government action").

emphasis added.) Federal Express did not fire Carroll "under compulsion of law." Moreover, contrary to Carroll's characterization, the Court in *Rendell-Baker* actually rejected the assertion that a school's termination of certain employees constituted the state action necessary to those employees' claims pursuant to 42 U.S.C. § 1983 (the "state action" claim Carroll does not assert). Likewise, in *Fidelity Financial Corp., supra*, the Ninth Circuit held that even though a bank was created by federal government agency, closely regulated and "subject to unusually extensive managerial supervision by the Bank Board," the bank's loan activities could not be characterized as governmental action. *Fidelity Financial Corp., supra* at 1435-1456. Carroll assumes, but cannot as a matter of law establish either that Federal Express was a "federal actor" in deciding to terminate his employment or as to the "challenged action" because it is not the person who allegedly committed the wrongful act. Carroll cannot assert a viable substantive due process violation under *Bivens, supra*, 403 U.S. 308.[8]

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8. Likewise, Carroll's only explanation for the assertion that his employment constituted a protected property right under the Fifth Amendment is that he "had a cognizable property interest in his employment with Respondent", which was a legitimate claim of entitlement in remaining at his old job under Respondent's policy implementing the DOT Regulations. (Petition, p. 16.) To claim such a property interest, a person must have more than a "unilateral expectation", and instead a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *Roth* held that a protected property interest is not created by the Fifth Amendment, but by existing rules or understandings that stem from an independent source such as state law. *Roth, id.* at 577. The Federal Express employment policy provided to Carroll specifies that Carroll's employment was "at-will," and that the written procedures provided guidelines for management and employment "but do not create contractual rights regarding termination or otherwise." (ER 000440.) The District Court held, there was "no evidence that Federal Express or Carroll took any steps to incorporate the federal regulations as a term of Carroll's employment." (ER 000166.) Carroll did not appeal this ruling.

C. Carroll's Procedural Due Process Claim Is Based On The Erroneous Assumption That Strict Compliance With The DOT Regulations Is Required.

Carroll's theory is essentially that employers subject to the DOT Regulations should be strictly liable to guarantee unwavering compliance — even by independent collection and testing providers. Under the vehicle of a *Bivens* action, Carroll effectively seeks a private right of action under the Regulations,[9] like the third claim for relief in his original complaint for damages (ER 000013-000014). This claim was dismissed by the District Court (ER 000158-000172), an order from which Carroll never appealed.

The flaw in Carroll's analysis is that due process is not coextensive with the Regulations. Carroll makes this leap of logic without analysis. Due process is not a fixed concept. It is flexible and demands procedural protections in accord with the particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). "Fair play" is the essence of due process. *See Galvan v. Press*, 347 U.S. 522, 530 (1954), *reh'g. denied*, 348 U.S. 852 (1954). Due process does not require an error free procedure, nor is it a guarantee of accurate results. *See Pinedo v. United States*, 347 F.2d 142, 148 (1965), *cert. denied*, 382 U.S. 976 (1966) (due process does not require "errorless counsel"); *United States v. Gallagher*, 183 F.2d 342, 345 (1950), *cert. denied*, 340 U.S. 913 (1951) (wrong decision on merits does not constitute denial of due process if opportunity for full hearing afforded). This Court has already acknowledged that regardless of the procedures employed for drug testing, it is "impossible to guarantee that no mistakes will ever be made in isolated cases" and that "no procedure can identify all impaired employees with ease and perfect accuracy." *Skinner, supra*, 489 U.S. at 629, and 632, n.10.

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9. "[Carroll] seeks to hold Respondent directly liable for its own failure and that of its contractor, OAC, to comply with the requirements of the DOT regulations." (Petition, p. 9.)

Mathews established a three-part test for whether procedural due process has been met:

> First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, supra, 424 U.S. at 335.

These factors establish that Federal Express provided Carroll with more than adequate procedural due process. First, Federal Express established testing procedures which Carroll does not attack as inadequate. He merely attacks his individual test. The procedures complied with the DOT Regulations (ER 000491-000492), were provided to OAC, and OAC was required to comply with them. (ER 000482-000483, ER 000489-000490.) Federal Express "audited" OAC's collection sites and collection procedures to help ensure such compliance.[10] (ER 000474-000476, ER 000499-000501.) Carroll never claimed that OAC was not equipped or qualified to administer the collection procedure.

Second, Carroll was given a clear opportunity to protect the integrity of his sample. At the time Carroll gave the urine sample to OAC, Carroll signed and dated the chain of custody form which accompanied his test sample and explicitly stated:

> I certify that I provided my urine specimen to the collector, that the specimen bottle(s) was sealed with a tamper proof seal, in my presence. I have initialed each bottle and that the information provided on this

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10. The OAC employee who took Carroll's sample was herself interviewed by Federal Express' audit personnel and could not recall being criticized in any aspect of her work. (ER 000520-000521.)

> form and on the label affixed to the specimen bottle(s) is correct.

(ER 000282, 000589; *see* Exh. 1 in Appendix to Respondent's Brief.)

It is also worth noting Carroll was clearly warned that he was subject to drug testing, advised of the procedures and told that testing positive on a drug test would result in his termination. (ER 000028, 000421.) Carroll cannot possibly argue he did not receive a "fair warning" of the procedures and the seriousness of the program: a positive test would end his employment. *See United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994) (due process clause forbids government from depriving individual of liberty absent "fair warning of the consequences" of conduct). (Disapproval on unrelated grounds as stated in *United States v. Randazzo*, 80 F.3d 623 (1st Cir. 1996).)

The procedures established by Federal Express, including the use of OAC, do not create a significant risk of "an erroneous deprivation,"[11] nor is there any potential value, "of additional or substitute procedural safeguards." Carroll's only complaint is that contrary to his certification on his chain of custody form, he did not in fact see his samples sealed with a tamper proof seal or see specific labels affixed to his specimen bottles. (Petition, p. 14.)

D. Even If Due Process Were Considered To Require Strict Compliance With The DOT Regulations, Carroll Cannot Establish Any Violation.

Even if one accepts Carroll's contention that due process requires, without exception, strict compliance with the DOT Regulations, Petitioner has not established any violation. The Regulations establish minimum procedures to protect employees' privacy rights and to account for integrity of samples. 49 C.F.R. § 40.3; Vol. 53 Fed. Register No. 224 at 47137. Thus, an employer is required to "develop and maintain a clear, and well documented

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11. The Regulations explicitly permit use of outside providers for sample collection and testing. *See* discussion below at Section 3, B.

procedure for collection, shipment and accessioning for urine specimens under this part." 49 C.F.R. § 40.23. It is undisputed that Federal Express *did* establish such procedures, and Carroll does not claim otherwise.

Although he fails to specify the Regulations(s) that were supposedly violated, Carroll's claim appears to be based 49 C.F.R. § 40.25[12] and specifically sub-section (f) entitled "*Integrity and identity of specimen*" (emphasis in original). 49 C.F.R. § 40.25(f)(17) requires that the specimen be sealed with a tamper proof seal and labeled in the presence of the employee; (f)(20) requires that the subject initial the identification label to certify the specimen is from him or her; and (f)(22)(i) requires that the subject

> be asked to read and sign a statement on the drug testing and custody and control for certifying that the specimen identified as having been collected from him or her is in fact the specimen he or she provided.

Federal Express' procedures complied fully with these pertinent requirements. (ER 000393-000396, 000464, 000418.)

Carroll's post-test result claim that he did not actually see the sealing and labeling cannot possibly establish a violation of the Regulations actionable against Federal Express. If true, then Carroll participated in the violation, but certified it never occurred. He should not be heard to complain. Most importantly, if permitted to proceed, every employee who tests positive can create doubt concerning the result of his test and threaten his employer with litigation simply by denying the accuracy of the record of chain of custody the employee verified. This will undermine the mandatory drug testing program and inflict overwhelming injury to the public interest in safety.

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12. It should be noted that sub-section (a) of this statute expressly states: "An independent medical facility may also be utilized as a collection site provided the other applicable requirements of this part are met."

III. THERE IS NO NEED FOR A FEDERAL "NON-DELEGABLE DUTY" RULE.

A. The Regulations Do Not, As Carroll Asserts, Exist For The Purpose Of Protecting The Due Process Rights Of Tested Individuals.

The plain language of the Regulations makes clear that the drug test requirements are aimed solely at protecting the public from the dangers posed by intoxicated drivers who operate commercial motor vehicles: The purpose of this [Regulation] is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage. 49 C.F.R. § 391.81(a).

The *Federal Register*, emphasizes the same point:

> The overall goal of testing is to ensure a drug free transportation environment which, in turn, would reduce accidents and casualties in motor carrier operations. This rule is necessary to prohibit a driver from driving while that driver has a prohibited drug in his or her system or if that driver has used drugs as evidenced by a drug test showing the presence of drugs or drug metabolites. The rule is intended to ensure a drug free motor carrier work force and to eliminate drug use and abuse in the motor carrier industry.

Federal Register, Vol. 53, No. 224, Monday, November 21, 1988 at p. 47134.

* * *

> . . . the clear public interest in assuring that commercial motor vehicle drivers perform their duties free of prohibited substances provides justification for testing and its limited intrusion on privacy expectations of these individuals. . . . *The impairing effects of these drugs and the substantial risks to public safety posed by drivers who use drugs*

> *underlie the compelling governmental interest in the promulgate [sic] of this rule.*

Id. at 47137 (emphasis added.)

As the Ninth Circuit correctly concluded:

> The regulations requiring motor carriers to maintain a drug-free work force may produce the collateral benefit of increasing safeguards for the privacy of tested individuals, but its raison d'etre is the protection of the general public.

Carroll, supra at 166.

Carroll misconstrues the purpose of the regulations, and in reliance on certain quotes from the *Federal Register* (Petition, pp. 10-11) attempts to make the argument that the Regulations are equally intended to protect "all rights" of the employees of the motor carriers subject to the drug testing program. Certainly, removing intoxicated drivers from the road not only protects the public, but their fellow employees and other commercial drivers. And, while the *Federal Register* does refer to an intent to protect "the privacy of individuals who are tested,"[13] there is no inference that the regulatory framework itself "exists for the purpose of protecting the rights of tested individuals." *See Carroll, supra* at 166.

B. The Regulations Expressly Anticipate Employers Will Meet Their Drug Testing Obligations By Use Of Independent Collection And Testing Services.

Employers like Federal Express are in the air and express transportation, not the drug testing business. Recognizing this, the DOT established Regulations explicitly permitting the use of independent medical facilities to meet drug testing program obligations. *See, e.g.*, 49 C.F.R. § 391.87(l); 49 C.F.R. § 40.25(a); and (f)(22)(ii). Indeed, the Federal Highway Administration's Notice of Proposed Rule Making actually suggested random testing

13. Petition, p. 11.

by contract with an outside company for services, or forming industry groups or consortiums for this purpose. 59 *Federal Register* No. 224 at 47141. Obviously, under the foregoing, Federal Express cannot be faulted for delegating collection duties to OAC.

C. There Exists No Basis Or Need For The Creation Of A "Non-Delegable Duty" Rule.

The Regulations are silent on the issue of whether they impose some "non-delegable duty" on the employer. While the Regulations state that the employer "shall *ensure* that the test performed" conforms with 49 C.F.R. § 40[14], "shall ensure" cannot reasonably be construed to require that an employer do more than Federal Express has. What more could Federal Express do? Have its own employees observe and supervise every stage of the collection and testing procedures for every drug test? This would eliminate the benefit (clearly contemplated by the Regulations) of allowing companies to focus on their own business, and use experienced specialists who can conduct the testing efficiently and accurately. "Shall ensure" must be construed rationally and with common sense. Federal Express did ensure that tests of its employees were conducted properly, as it took every available and reasonable measure it possibly could. The alleged breakdown in procedure — assuming it actually occurred — was participated in by Carroll. Federal Express cannot guarantee absolute compliance with the Regulations if the employee being tested does not avail himself of the critical chain of custody protections and, instead, certifies they were complied with.

Carroll asserts that 49 C.F.R. § 40.1 must be interpreted to hold employers vicariously liable for errors in procedures by outside testing services. Section 40.1 reads:

> This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employees including self-employed individuals, required to

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14. 49 C.F.R. § 391.111(b) (emphasis added).

> conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to consortia). Employers are responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements of this part.

Although it is not altogether clear, it appears Carroll suggests the reference to "contractors" in § 40.1 renders compliance with the regulations a non-delegable duty. This too is not a common sense reading of the regulation. By "contractors," the Regulations refer to outside persons or entities such as truck drivers, which a transportation company like Federal Express might use to "contract" with. Such outside "contractors" would then also be subject to mandatory drug-testing under the Regulations. If the DOT had intended that the word "contractors" include outside independent drug collection or testing organizations, it would have used consistent language throughout the Regulations. Instead of referring to such outside testing services as "contractors", the DOT described them as "independent medical facilities." *See, e.g.*, 49 C.F.R. § 40.25(a); *see also* 49 C.F.R. § 391.87(l) which requires that administrative records "shall include agreements with collection facilities" and "laboratories", but does not reference "contractors."

Carroll's reliance upon *Skinner, supra*, 489 U.S. 602 (Petition, pp. 11-12) does not support a different interpretation of "contractors," or imposition of a non-delegable duty under the DOT Regulations. While *Skinner* provides that a "railroad may not divest itself of, or otherwise compromise by contract, the authority conferred by [the Regulations]", the Court discussed this restriction in the context of a collective bargaining contract or an arbitration award construing such a contract. *Skinner, supra*, 489 U.S. at 615. Thus, the restriction is "for the purpose of promoting the public safety, and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety." *Id.* Carroll's reliance

on *West v. Atkins*, 487 U.S. 42 (1988), and *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982), does not change this conclusion.

In *West*, the petitioner was a prisoner who alleged he was refused necessary medical treatment by respondent, a physician who was under contract with the state of North Carolina to provide medical services to inmates in the state's custody. Petitioner claimed that respondent doctor had acted "under color of state law" and that the physician's acts and omissions constituted cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court determined that the state could not divest itself of its constitutional mandate under the Eighth Amendment. *West* is unhelpful to Carroll's case as it did not even consider a non-delegable duty issue, but only whether the physician could be sued pursuant to 42 U.S.C. § 1983. Unlike the petitioner in *West*, Carroll has not sued the individual he claims violated his rights. *West* has no bearing on whether vicarious liability should be imposed for another's conduct.

In *General Building Contractors*, African-American plaintiffs representing a class of minorities filed suit under 42 U.S.C. § 1981. The plaintiffs sought to redress alleged racial discrimination in the operation of a union hiring hall which was open only to Caucasians. *Id.* at 393. Even though § 1981 prohibited discrimination, this Court refused to impose a non-delegable duty to prevent that discrimination in the selection of a work force, because the statute did not create any duty in favor of the claimants:

> [T]o characterize such a duty as non-delegable is merely to restate the duty . . . the question is not whether the employers and associates are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is what duty does § 1981 impose. . . . The language of the statute does not speak in terms of duties.

In sum, Carroll's allegations and the record do not support a

claim that the intent of the drug testing Regulations, *i.e.* protection of public safety, is in any way jeopardized by Federal Express' delegation to OAC such that only OAC and its employees are responsible for any alleged violation of due process that *they* engage in. Federal Express was removed from the collection and evaluation procedures. There is no evidence, or even the appearance, that Federal Express tampered with the testing process. Such a lack of opportunity for interference by an employer and delegation to a trained, qualified independent contractor actually serves to significantly increase the reliability and legitimacy of the entire drug test procedure. Delegation to a qualified independent contractor should preclude any claim that the drug test was misused by an employer to discriminate against or terminate an employee under the pretext of a false positive test result.

D. Carroll Is Incorrect That Lawsuits By Terminated Employees Are Necessary To Ensure Compliance With The Regulations.

Carroll attempts to paint the following "parade of horribles:"

> If the Ninth Circuit's opinion is permitted to stand, this Court will allow employers throughout this country to disregard the requirements of federally mandated drug testing, to divest themselves of all responsibility and liability for violations of such regulations, simply by delegating the actual operation of the collection to third parties [sic] collection site personnel.

(Petition, p. 12.)

Federal Express does not seek to "divest itself" of responsibility under the Regulations. Again, it established guidelines and procedures as required by the Regulations, informed its employees of how the procedures functioned and took reasonable steps to ensure compliance.

It is naive and unfounded to imagine that the DOT would not enforce the Regulations, such that private lawsuits filed by

employees who test positive, are necessary to avoid non-compliance. Employers such as Federal Express have compelling incentive to comply with the Regulations. *See* 49 C.F.R. § 382.507, which provides: "Any employee or driver who violates the requirements of this part, shall be subject to the penalty provisions of 49 U.S.C. Section 521(b)." 49 U.S.C. § 521(b) puts employers at risk, among other things, of civil penalties (§ 521(b)(2)(A), criminal penalties (§ 521(b)(6), a safety/inspection/audit by the DOT (§ 521(b)(1)(B), and an order "to case all or part of the employer's commercial motor vehicle operations." (§ 521(5)(A)).

In reality, the "parade of horribles" is that which Carroll advocates. Employers who retain qualified independent medical facilities to conduct their collection and testing would live in fear of taking action on positive drug test results. If Carroll has his way, any employee, even if he or she has certified that the chain of custody procedures were followed, and without any direct evidence of tampering or switching, is entitled to a federal jury trial simply by claiming "I never used drugs." Such a swearing contest would be based on the faded memories of witnesses like OAC's Lindy West, who cannot possibly recall the precise details of each of the thousands of drug sample collections they may have performed. It would open the floodgates of litigation in Federal Courts and erase the drug testing program by allowing a jury to determine the accuracy of every positive drug test. It would fatally undermine the critical public goals behind the mandatory drug testing program.

III. CARROLL APPEARS TO HAVE ABANDONED HIS APPEAL FROM JUDGMENT ON HIS STATE LAW BREACH OF IMPLIED CONTRACT CLAIMS, BUT, IF THIS IS NOT THE CASE, THE NINTH CIRCUIT PROPERLY AFFIRMED JUDGMENT ON THESE CLAIMS AND THERE IS NO BASIS FOR A GRANT OF CERTIORARI WITH RESPECT TO THEM.

Carroll's initial complaint contained several claims for relief, including "breach of implied contract/wrongful termination" and "breach of the implied covenant of good faith and fair dealing."

(ER 000001, ER 000015-000020.) These claims are clearly based on California law, as they assert implied contractual rights in favor of Carroll to continued employment with Federal Express. Carroll's questions presented for review do not make any reference to these claims. As the rules of the Supreme Court of the United States require a petitioner to set forth all questions presented for review (Rule 14.1(a)), and the Petition does not clearly argue for such claims, it appears Carroll has abandoned them.

Nevertheless, contained in Carroll's discussion regarding "federal actors" on pages 15 through 17 of his Petition, is a curious passage asserting that Carroll had, with Federal Express,

> an implied agreement that it would not terminate Carroll's (or any employee's) employment because of testing positive on a drug test unless the employee did, in fact, test positive. . . . ¶ Respondent breached the contract, irrespective of any good faith belief on its part.

(Petition, p. 16.)

Out of caution, in the event this portion of Carroll's Petition is intended as an appeal from the Ninth Circuit order on his contract claims, Federal Express briefly addresses them.

Carroll cites the Court only to the District Court's decision on Federal Express' initial motion to dismiss (preceding any discovery), for the proposition that a trier of fact could determine that an implied term required "just cause" for Carroll's termination. (Petition, p. 16.) Carroll fails to advise the Court that the District Court subsequently granted Federal Express summary judgment on this claim. (ER 000618.) Likewise, Carroll fails to mention that the Ninth Circuit's decision which explicitly rejected Carroll's claim that Federal Express' drug testing policy created an implied contract, held that Federal Express acted in good faith under the terms of its personnel policy when it terminated Carroll. *Carroll, supra* at 167.

Carroll argues that Federal Express' good faith belief that cause existed for his termination "was not a substitute for good cause when its belief was, as here, factually incorrect." (Petition, p. 16.)

Citing to *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991), Carroll argues that a jury trial is required because a factual question exists when an employee denies the misconduct which is the basis for his termination. Again, Carroll has been less than forthcoming with this Court. *Sanders* is a case applying *Alaska* law, not California law. In fact, Alaska law places the burden of proof on the employer when good cause is required, and provides that a jury is entitled to decide whether the alleged misconduct actually took place, unless the facts are so clear that the issues can be decided as a matter of law. *Sanders, supra* at 194. *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217, 1231 (1989) correctly states California law: an employer's good faith belief, even if factually incorrect, will defeat breach of implied contract claims such as those Carroll asserted in his complaint.

Given Carroll's execution of a statement concurrent with the drug test that his sample was properly processed and Federal Express' adherence to its stated policy, Carroll's termination was appropriate as a matter of California law. Rule 10 of the Rules of the Supreme Court of the United States provides:

> A petition for a writ certiorari is rarely granted when the asserted error consists of erroneous factual findings *or the misapplication of a properly stated rule of law.* (Emphasis added).

Carroll has not established any reason why this Court should accept certiorari with respect to his implied contract claims.

CONCLUSION

For the foregoing reasons, Respondent Federal Express respectfully requests certiorari be denied.

Respectfully submitted,

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APPENDIX A — DONOR CERTIFICATION

DONOR CERTIFICATION

I certify that I provided my urine specimen to the collector, that the ***specimen bottle(s) was sealed with a tamper proof seal in my presence. I have initiated each bottle and that the information provided on this form and on the label affixed to the specimen bottle(s) is correct.***

[Excerpt of ER 000282.]